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Edited by **RICHARD T. ELY.**

**THE NEW AMERICAN GOVERNMENT  
AND ITS WORK**

**SOCIAL SCIENCE TEXT-BOOKS**

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**OUTLINES OF ECONOMICS**

By RICHARD T. ELY, PH.D., LL.D. Revised and enlarged by the AUTHOR and THOMAS S. ADAMS, PH.D., MAX O. LORENZ, PH.D., ALLYN A. YOUNG, PH.D.

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**THE NEW AMERICAN GOVERNMENT AND ITS WORK**

By JAMES T. YOUNG.

**OUTLINES OF SOCIOLOGY**

By F. W. BLACKMAR AND J. L. GILLIN.

2

# THE NEW AMERICAN GOVERNMENT AND ITS WORK

BY  
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UNIVERSITY OF PENNSYLVANIA

New York  
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## PREFACE

THIS book is intended for that large and growing circle of students and readers who want to know not only what the government is, but what it is doing,—its plans and results. In order to meet this need certain distinctive features, it is hoped, may be found in the present treatment. First—The *work* of the government is given fully as much space as its *form* or structure. Political forms are always of interest but they no longer occupy the centre of the stage. Government usefulness and activity are now coming strongly into the foreground and this fact should be clearly reflected in our modern texts. Accordingly much greater emphasis than usual has been given to this part of the subject so that the student may grasp the important achievements and problems of both nation and state. Second—In carrying out this thought, special attention is devoted to Government Regulation of Business because in all parts of the country this has assumed a prime interest for both the university student and the general reader. Third—Certain phases of Social Legislation have also been brought out in order to give a clearer statement of the government's work. Fourth—Judicial decisions unfolding and interpreting the vital and essential public powers have been assigned an unusually prominent place and have supplanted less important matters. The aim here has been to lend more reality, vividness and clarity to a subject that is already beset by too many generalities. Fifth—In describing the structural side of our system, a stronger emphasis has been placed upon the Executive in order to bring the picture more into harmony with the real facts of public practice. Executive leadership to-day is the outstanding feature of our institutions. Instead of combating this fact or presenting it as an aberration from the true type, the present book accepts it unreservedly as a new and more effective form of working out our public problems and welfare. The Executive both in State and nation is set forth not as a self-seeking usurper but rather as a factor for efficiency, a means of carrying out the popular will. Our government is not a finished product nor a perfect crystal, it is still growing, and ever facing new problems. The Executive has shown itself to be peculiarly fitted to study and investigate these new conditions, to plan and propose modern solutions for them and to carry out the mandate of the people in the face of opposition and inertia. Sixth—Our government is here presented as a means of service. It is no longer a mere necessary evil,—nor is it a Moloch, calling upon men for sacrifice only. One goal the author has persistently kept before him,—to picture the new government as it

serves and helps the people, copes with their problems and aids in their struggle for a more abounding commonweal. Municipal government has not been included, since that subject is now handled in all the universities as a separate and distinct part of the field with its own special literature. Special acknowledgment is due to the editor of this series, Dr. Richard T. Ely, for his invaluable criticism, suggestion, and advice. With the faculty and student body at Pennsylvania the author also enjoys such an intimate relation that he feels the book to be largely a product of their inspiring friendship. To them it is dedicated.

APRIL, 1915.

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**THE NEW AMERICAN GOVERNMENT  
AND ITS WORK**



# THE NEW AMERICAN GOVERNMENT

## CHAPTER I

### INTRODUCTION

#### HOW BUSINESS INFLUENCES GOVERNMENT

OUR national government is passing through an era of sweeping and important changes. The one central fact that stands out clearly in all these changes is the concentration of power. Political leaders have decried this tendency, magazine writers have denounced it, newspaper editors have deplored it, even the people themselves dislike and distrust what is called "centralization," yet it goes steadily on with such quiet, irresistible force that we must finally accept it as a feature of our plan of government. Let us glance at some of the forms of concentration produced by the conditions of the last few decades.

**1. The Supremacy of the National Government.**—In the titanic struggle between the State and the Nation, victory has been with the Nation. This question was settled in one form as long ago as the Civil War, but since then the national government has grown strong not by reason of military power but because of the magnitude of our internal problems and our growing foreign policy. Leaving behind us the petty jealousies of the States we have become Americans, and our sympathies and interests lie with the whole people rather than with any section. Foremost in producing this result has been the unifying and consolidating force of our expanding business interests. These have knit us together in a way that no constitutional convention could ever have accomplished. It is related of President Lincoln that desiring to arrange for the transportation of Union troops to the South, he sent for Mr. Thomas Scott of the Pennsylvania Railroad, and with him went over a railway map of the country. The President expressed his astonishment at finding that all the great lines ran East and West and that the problem of rail transporting southward was an almost impossible one. To all of which Mr. Scott tersely replied, "Mr. President, if the railroad lines had run North and South, there would have been no war."

In 1789 every influence seemed to favor the supremacy of the State as the center of gravity in government. The scheming of small politicians, the State patriotism of the people, the traditions



of local self-government, the fear of centralization, all of these forces made the people chary of conferring strong powers on the central authority. But gradually the farmer and the banker, the cotton grower and the manufacturer have found that their interests although located in different parts of the country, were closely intertwined. "Business" has refused to be confined within bounds and has reached out to include whole sections and districts, located in more than one State. This expansion was hastened by the stock corporation, which by its immense capital made it possible to unite the branches of an entire industry. When finally the rise of swift and cheap transport facilities and means of communication generally, brought all sections of the people into the closest business relations with each other, the knell of State sovereignty was sounded and the supremacy of the union became inevitable. The Nation was first.

**2. In the struggle just described, Congress has developed much greater powers than it exercised fifty or even thirty years ago.** New problems have arisen which could not have been foreseen by the Fathers of the Constitution. New mechanical inventions have occurred revolutionizing the world of commerce and enormously increasing those aspects of business that come under the control of the national government. To meet these new needs Congress has extended its activity beyond the old limits until at the present time the legislative power of the Nation has reached a point that would have been regarded as dangerous, if not fatal, by the framers of the Constitution. Yet this concentration has been in response to a strong natural demand, and has resulted favorably to the welfare of the people.

**3. Inside Congress a Few Men in Each House have Succeeded in Gaining Sufficient Power to Control Legislation.**—They have built up a clique or organization of leaders whose sway over the law-making bodies is well-nigh absolute. The average congressman, unless he belongs to the organization, is powerless. This peculiar legislative system, which is described in detail in the Chapter on The House of Representatives, is generally admitted to be dangerous and even harmful, but it has survived because it seemed to be the less of two evils. The alternative is stagnation. Concentration of power is necessary in order to carry out the party program. The people have held the majority party responsible for legislation, and that party in order to fulfill its pledges and strengthen its hold on popular favor has felt obliged to centralize.

**4. But the greatest example of political concentration is seen in the executive office.**<sup>1</sup> Here our country has turned its back on the traditions of Revolutionary days and has created a one-man power of the strongest type. The President, who was intended to be merely an agent of the Congress, has become the leader of both legislative and executive branches. Such a change has not

<sup>1</sup> See the Chapter on The President.

been deliberately planned, but has come about through the same necessity for producing results and for getting work done that has affected the other parts of the government. The President to-day and the President of a century ago really belong to two distinct types of government, and though the text of the Constitution remains unchanged, yet the substance of the Presidential influence has increased beyond the worst fears of the Fathers. He is now the leader, if not the master, of the government.

**The Theory of Checks and Balances.**—The great changes just described have all been opposed to the spirit and intentions of the men who drafted our form of government. If there was one fear that animated all members of the Convention of 1787, it was the dread of highly concentrated power. As Englishmen they had long believed in the doctrine that government should be built up of Checks and Balances, that is, every authority, officer or legislative body should have some other authority which would check its power and prevent it from becoming absolute or despotic. One form of this doctrine is the theory of "Division of Powers." A brilliant French writer, in a book<sup>1</sup> which was read and studied carefully by influential members of the Convention of 1787, declared that the division of government into the executive, legislative, and judicial departments was a necessary means of preserving the liberty of the citizens against oppression. His method of reasoning was simple. He asks, in what country is the freedom of the citizen best preserved? At the time of writing England was undoubtedly the freest country in the world. How is this freedom of the citizen secured in England? The author's answer was that the British government at that time separated sharply the executive power of the King from the legislative power of Parliament and the judicial power exercised by judges appointed for life. No other country at that time carried this division of powers as far as did Great Britain. Montesquieu therefore concluded that the division of powers was the most effective means of preserving the liberty of the citizen from government despotism. The Fathers followed this theory faithfully in 1787. The three departments were separated as far as possible, and where their co-operation was necessary, they were set in balance as checks against each other. It will be noticed that the underlying motive of the Fathers was the *fear of oppression*. Briefly expressed it is: "Let us divide governmental power into minute particles, giving a small part to each authority so that none may become supreme or even dangerous."

Such in brief is the famous doctrine of Checks and Balances. It is a theory inspired by fear. This theory is now confronted by a new set of intensely practical conditions: namely,

- I. The growth in volume of government business.
- II. The rise of technical questions in government.
- III. A popular demand for greater speed in government action.

<sup>1</sup> Montesquieu: *The Spirit of the Laws*.

#### IV. The large size and slowness of legislative bodies.

**I. Growth of Government Business.**—The rise of manufacturing industry and large transportation enterprises has immensely increased the duties of all branches of our government. Manufacturing has involved:

Government efforts to aid and protect the national industries in every legitimate way,

The rise of the factory system,

The development of commercial law, requiring uniformity,

The desire for equal opportunity for all manufacturers and shippers on the railways,

Need of technical education,

Rise of large cities,

Demand for better health protection both in factory and tenement house,

Use of child labor,

Growth of a distinct labor class with separate interests,

Rise of other class interests.

As we glance over this list the surprising fact appears that every one of the changes noted involves some necessity for government action. Many of them fall under the authority of the State and city governments, yet all influence directly or indirectly the national government also, so that its work has multiplied by great leaps and bounds in the last few decades until, at the present time, each Congress is inundated by an avalanche of over 30,000 bills, orders and resolutions. This great increase in the volume of public business means that a radical change must be made in the old methods of work and in our government machinery, in order to secure results.

**II. The Technical Nature of Modern Public Questions.**—Most of the government problems of to-day cannot be settled by a popular vote. Even though our voters were all university graduates we could not reasonably demand that they work out a plan of government regulation or control. The location of an Isthmian Canal, the reorganization of the army, the construction of a navy, the more rational development of our postal facilities, the planning of systems of irrigation, the regulation of corporate finance, the control of railway rates and the management of our colonial dependencies are national questions of prime importance that cannot be settled by simple common sense and patriotism. They require rather the careful study of trained specialists and experts. If we examine the public problems brought up for discussion in the President's message we find that they are not only industrial or commercial but also *technical* in character.

How does this fact influence our government? Unquestionably it causes a greater concentration of power, because it means the gathering of these technical problems into the hands of men with scientific training and skill whose function is to present their solu-

tion in such form that legislative bodies and the public generally can say "yes" or "no." Such a method of handling public questions is impossible under the old system of divided powers and responsibilities. The modern plan involves strong leadership and the systematizing of public affairs to an extent that was unknown in the earlier decades of the Republic. Our government hitherto has resembled some large industry, like that of sugar refining for example. A large number of small, independent plants, with expensive methods of production, high prices and a limited demand form the first stage of development. Then comes a stronger demand, new and important mechanical processes are discovered and it becomes possible to apply these processes so profitably by manufacturing on a large scale that the price of the product falls rapidly. Furthermore the development of the industry leads to the opening up of new lands and it becomes necessary for the sugar refiner to enter into closer business relations with the beet growers. Eventually also the refining interests find it profitable to purchase large tracts of sugar cane land in the tropics and operate immense plantations. But with each of these stages in the development of the industry, the business becomes more complex and requires a greater use of skilled experts and specialists. Eventually the whole sugar industry is reorganized on a modern basis; those enterprises which are able to make use of the latest scientific researches and inventions survive, and those which fail to do so are gradually displaced by competition. In this process the industry has been centralized under the control or leadership of one or two large corporations because production on a large scale, the systematizing of methods and the development of valuable inventions can only be secured by concentrating the management and control of the business.

So with our government: The early stage of divided powers and checks and balances continued as long as the number of things to be done by the government was small and the nature of these tasks was simple, but as greater and more complicated problems began to present themselves the advantages of system, science and method increased until finally the government is being reorganized on a modern basis of efficiency. It is this greater effectiveness that justifies concentration.

**III. The Demand for Quick Government.**—An interesting change in the political psychology of the American people is the nervousness and impatience of delay that we now show towards public questions. Instead of the meditation and reflection on political problems that marked our early history as a nation we now think in sudden gasps, spasms and outbursts of emotion. Whether it be the hysterical outbreak of a lynching mob or the serious, earnest efforts of a city improvement club, we are inclined to rush matters, and we are impatient of obstacles, once it is known that an evil exists and demands a remedy. The age of oratory, eloquence and prolonged discussion has almost passed. The people want action,

immediate action. Doubtless it were better that more deliberation be exercised, that in the quaint phrase of a former State governor "celerity should be contempered with cunctation," but such is not the view of the people as a whole.

This demand for a quick government is after all an inevitable result of our surroundings. It is primarily due to modern means of communication, which enable us to speak five times where we formerly thought once. We see and communicate with more people, travel over a larger territory, are interested in a far broader scope of affairs and transact more business in one day than our forefathers could in a fortnight,—all because of better means of communication. The demand for speed feeds on itself. With each year a larger proportion of human energy is devoted to the saving of time. Modern business conditions are in this way breeding a "quick" man with swift mental processes, a wonderful capacity to see and grasp the opportunities of the moment, but with a corresponding intolerance of delay. Is it strange that this new type of man wants a government that will produce quick results? But a quick government means a concentrated government. Not only must the control of these urgent matters be placed in the central authority, but within the latter itself the executive and legislative work must be so arranged that affairs can be dispatched and decisions reached with the utmost celerity.

Such are the new and changed conditions which in the last thirty years have arisen to confront our government,—our government which was founded on the old theory of checks and balances. Any one of these influences would have been enough of itself to cause some change in our political methods, but all combined have been irresistible; before them the whole fabric of divided powers has given way and a new system is taking its place.

But in all that has been said, it must be remembered that we Americans have not voluntarily given up the old doctrine of division of powers—we have not intentionally gone about to repeal that doctrine. The man who invented the steam engine and the trolley motor is responsible for it. A political theory is the result of conditions; a change of conditions brings a new theory. The passenger elevator has changed the architecture and "sky line" of our cities, the discovery of germs has given us a new preventive policy of public health; and so, gradually and insensibly without the blare of trumpet or the eloquence of orators our mechanical and industrial growth has created a new political philosophy. The keynote of this newer American government is Efficiency. Work must be done, problems attacked and solved, national policy planned and executed; the government must produce results for the people. We have always thought of government as a necessary evil. We have been patriotic, we have fought, bled, and died for our native land, but for the government itself we have always cherished the half-concealed feeling that the less it attempted, the better. Our

grand old Constitution itself is always referred to on the Fourth of July as the "palladium of our liberties," which in plain English means, that it keeps the government from abusing us. That curious persistent idea,—that the government must always be kept from doing something which it is about to perpetrate, is now on the eve of disappearance, and we are developing in its place a new thought that the government is to perform a great and increasing amount of public service for the whole people. Government is now to be a means to an end, not the end itself. We are no longer, in the words of a prominent New Yorker, to believe that government is like the air, to be noticed only when it is bad. Hereafter, it is to be not a burden but a convenience. And what a marvelous vista of possibilities this new doctrine has already opened up in our national policy. Millions of acres of land have been reclaimed for cultivation by modern systems of drainage and irrigation. Hundreds of millions of dollars worth of new crops have been added to our national wealth and prosperity by the Department of Agriculture. The people of hitherto unattainable regions of South America and Australia are brought within the reach of the Atlantic seaboard by the greatest engineering feat of modern times. And in the State governments the new idea is taking root no less rapidly and with amazing results. Hitherto unconquerable obstacles to greater prosperity, and problems of health and crime and poverty are now being attacked with the confidence and inspiration born of this new belief that the purpose of government is Service. It is this belief in the greater usefulness of government that has created the demand for efficiency. Against this universal demand are balanced the fears of the fathers, the general dislike of concentrated power, the traditional arguments against centralization and the natural conservatism of our people in political matters. Efficiency has gradually turned the scale. We are fairly launched on our new career with a set of political institutions whose form is the same as of yore, but whose real substance is as different from that planned in 1787 as are the conditions of that day from ours.

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## CHAPTER II

### THE PRESIDENT

In our progress towards a stronger system of government, the great surprise of the Constitution has been the Executive. Designed to be a mere faithful agent of the Congress, he has become the real head of the government; dreaded by all as a prospective tyrant he has grown to be a tribune of the people. It is not easy to find a single aspect of the President's office which has worked out as it was originally intended. The limits and restrictions placed on him have proven vain, the powers originally given him have grown steadily with the increasing work of government, and the attitude of the people has become one of dependence rather than distrust. Even the method of choosing the President, upon which the fathers spent so much of their ingenuity and inventive skill has worked out far differently from their plans. If the men of 1787 could see the Executive office as it is to-day they would not recognize their handiwork. Yet with few exceptions the changes have been along the line of greater simplicity, directness and strength and have all tended to make the government more effective and more responsive to the popular will.

**Election of the President.**<sup>1</sup>—The thought of the framers was that the President should be removed from the masses of the people by an indirect election, in order to prevent some wave of popular enthusiasm from sweeping into office a demagogue or a military leader who might subvert the political institutions of the new Republic. To prevent this the fathers designed the plan of selection by Presidential Electors who in turn should be chosen by the various States in such manner as the State legislatures would determine. It was expected that the legislatures themselves would choose the Electors, and this method was at first followed. It was also expected that the Presidential Electors when chosen, meeting in each State at the capitol, would weigh and consider the merits of respective candidates, making a choice perhaps from prominent members of Congress who were known to be men of proved statesmanship and ability. As there were in 1787 no parties such as later developed, it was not foreseen that party politics would play any rôle in the choice. In order to secure the election of an equally qualified man as Vice-President it was originally provided that in balloting at the State capitol each Presidential Elector should vote for two persons for President, and that of

<sup>1</sup> The method of nominating the President is described in the Chapter on The Party.

these two, the one who received the majority of all the Electoral votes should be the President, and he who received the next largest number should be the Vice-President. Such in brief was the plan of Presidential election. Its essential feature was the choice by "the best" of the people, it being assumed that the Presidential Electors would be "the best" because they were chosen by men of unusual ability, to wit, the State legislatures. But although this plan had been thought out with great care it was not based upon the real political conditions of the time and it did not provide for political parties. It was not a natural method.

**The Indirect Method in Practice.**—The Election of 1800 in which Jefferson and Burr were the chief contestants showed that the plan was weak in important points, notably that so long as each Presidential Elector voted for two persons for President there was a danger that the man who received the second highest number of votes and thereby became Vice-President would be of a different party from the President. In case of the death of the President the control of the Executive would therefore pass to the minority party. Party feeling at this time was even more bitter than at present. In order to remedy this weakness the Twelfth Amendment was adopted in 1804; its principal provisions are that each Presidential Elector shall vote for one person as President and one person as Vice-President.<sup>1</sup> Another feature of the indirect system, which has attracted much attention, is its uncertainty. In 1876 a serious dispute arose over the contested returns from four doubtful States. These votes would decide the election, and in each State two sets of returns, one Republican and one Democratic, were sent to Washington. On account of the importance of the dispute, an Electoral Commission of fifteen members was provided for by Congress to decide which returns should be accepted. Eight of the members were Republicans and seven Democrats. By a strict party vote of eight to seven the Republican returns were accepted from all four States and the Republican candidate, Hayes, was thereby declared elected over his Democratic competitor, Tilden. The partisan nature of the Electoral Commission vote and the fact that Tilden had the larger number of popular votes led to great dissatisfaction and even to talk of civil strife. Congress has therefore provided by law that in case any State shall hereafter send in two sets of returns, those returns shall be counted which are accepted by both Houses acting separately, and in case the two Houses cannot agree the vote of the State shall be lost.

A third criticism has been aroused by the needless complexity of the indirect system. All the Electors are now chosen by the voters,

<sup>1</sup> In case no one Presidential candidate receives a majority of all the electors, the House of Representatives chooses the President from the three candidates having the highest votes. After the popular election in November, the Presidential Electors meet at the respective State capitols on the first Monday of the following January, and cast their votes. The returns from the respective States being sent to Washington are counted on the second Wednesday of February.



why not let the people vote directly for the President? The original idea that the masses of the people should not know who the candidates would be, and that they should not take part in the choice has now been abandoned for over a century. The nominee of each party is chosen in a party convention in June or July, and is known to the people as a candidate. Furthermore, the men nominated as the Presidential Electors by each party if elected, are morally pledged to vote for the candidate of their party:—to vote for the opposite party's candidate would be universally regarded as an act of treachery, although it could not be punished by law. The ballot used in the popular election of the Electors clearly states which party they will support if elected. For example the names of the Republican Electors are grouped in one column, under the name of that party, the Democrats in another, etc. Everything possible is therefore done in order that the people *may* understand clearly and make a conscious choice. To preserve the old fiction that the people are not electing the President is therefore in the face of all these facts, manifestly unwise and even harmful. It is true of all political institutions that the greater their naturalness and simplicity, the greater their chances of success and permanence. Our Presidential electoral system has failed because it is a complex method based on a distrust of the people.

**Injustice of the Indirect Method.**—Finally, the gravest and most serious weakness of the indirect plan is that one candidate may be chosen by the people while another is elected by the Electors. The popular choice is thus defeated. Twice in our history this unfortunate result has occurred. In 1876 Samuel J. Tilden received a popular plurality but was defeated in the Electoral Commission, and in 1888 Grover Cleveland received a popular plurality of 98,017 but the Electoral College by a majority of 65 votes elected Benjamin Harrison.

This is possible because in choosing their Presidential Electors the States do not divide themselves into districts with one Elector for each district, as is done in the election of Congressmen, but each State gives all of its Presidential Electors to that party which wins the popular election in the State, no matter how small the majority may be. The popular majority in a State may be only 1,000 for a party, yet that party receives all the Electors. The minority are given none.

New York has 45 Presidential Electors.

Pennsylvania has 38 Presidential Electors.

New York is a "doubtful" State, with the parties evenly divided, while Pennsylvania was for years overwhelmingly Republican. Let us suppose that Pennsylvania gives the Republican ticket a majority of 200,000 popular votes and that New York goes Democratic by only 50,000 popular majority. Omitting the rest of the States from the calculation the result of the election in these two would then be:—

## POPULAR MAJORITY

Republican: Pennsylvania . . . . . 200,000  
 Democratic: New York . . . . . 50,000

Net popular majority: 150,000 for the *Republican* ticket in the two States.

## ELECTORAL MAJORITY

Democratic: New York, 45 electoral votes  
 Republican: Pennsylvania, 38 electoral votes

Net electoral majority in the two States, 7 Presidential Electors for the *Democratic* ticket.

In this way the Republicans would win the greatest popular vote but the Democrats would secure a majority of the Electors and with it gain the election. This important difference between the popular vote and the electoral vote is shown by the election of 1908, when of the entire vote secured by the two leading candidates, Mr. Taft secured 70% of the Electors by winning only 55% of the popular vote for the two men, in 1912, taking again the shares obtained by the two leaders, Mr. Wilson got 83% of the Electors by winning only 60% of the popular vote for the two men. The indirect system is a standing peril of civil dissension and strife.

The question arises—why not give each candidate a proportion of the electoral votes equal to his proportion of the popular vote. If he secured three-fifths of the total popular vote in any State let him receive three-fifths of the Presidential Electors from that State. The answer is that the Constitution has left the method of choosing Electors entirely to the States. In Article II, Section 1, Clause II, it is provided that “Each State shall appoint, *in such manner as the legislature thereof may direct, a number of Electors.*” The controlling party in each State, under this plan enjoys the advantage of depriving the minority party of all electoral votes. While the people as a whole would prefer a fair system, the local party interests in each State would be injured by a change. A change of method can only be secured by the rise of a strong favorable sentiment in all the States, and when that comes it may take the form of a demand for direct election, following the method now used in choosing Senators and Representatives.

**Salary.**—The Constitution does not fix the President’s salary, but leaves this to Congress, with the single restriction that his compensation “shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States or any of them.” While he may not be paid more as a part of his salary or emolument he may and does receive other allowances. The President’s salary has been raised from \$25,000 at the outset of the government to \$75,000 at the present time; there are also numerous allowances for clerk hire in the White House,

travelling expenses \$25,000, repairs, furnishings of the executive mansion and other smaller items. The President is also allowed a contingent fund of \$25,000. It is not unusual for the total Presidential expenses, including all items connected with the White House and grounds, to amount to \$300,000. Even at this figure he is paid less than most European executives, particularly when the size and wealth of the country are considered. The President's personal expenses are heavy, so that few of our national Executives have been able to save any great part of their salaries.

**The President's Powers.**—The Constitution confers five important powers on the President:

- I. Appointments.
- II. Legislation.
- III. Foreign Relations.
- IV. General Enforcement of the Laws.
- V. Command of the Military and Naval Forces.

The above is the order of importance of these powers in ordinary times; it may be temporarily changed or reversed by special circumstances. A war may raise the Executive to the rank of a military dictator; a series of negotiations with foreign powers, at some critical moment, may focus all eyes upon his control over our relations with other peoples, but in the long run the order above given tends to re-establish itself. It is remarkable that of the five powers named, the last is probably the only one which is exercised in the way and to the extent intended by the fathers.

**I. The Appointing Power.**—Former President Harrison said of appointments to the Federal service, that the President spent from four to six hours daily during the first half of his term in hearing applications for office. This gives some idea of the practical meaning which the power has for the President to-day. Yet, as originally conferred by the Constitution it did not seem extensive. Although it included all the positions in the Federal service, these were surprisingly few, slightly over a thousand. Most of them are reported to have been made personally by the President. The number of positions in the Civil Service at the present time is 400,000, of which the President with the advice and consent of the Senate, appoints about 7,800. It is manifestly impossible for one man to make the actual selection for any considerable number of the vacancies occurring in these offices; the practice therefore early arose of allowing a Senator or Representative to suggest names for offices situated in his State. The Constitution declares that "the President shall nominate, and by and with the advice and consent of the Senate appoint. . . ." But by the necessities of the case, the Senate now nominates while the President gives his consent. This reversal of the constitutional intent has been further aided by the custom known as "Senatorial courtesy:" should the President seek to ignore the preference of a Senator for appointments in his State, the other Senators rally to the support of their colleague by refusing

their approval of the person favored by the President for the position in question. Numerous Presidents have attempted with varying degrees of success to break down the custom but with each administration it has been re-asserted. The President can often overcome opposition or force a compromise by curtailing the number of appointments which would otherwise have been allotted to the hostile Senator, especially for positions in Washington or in the foreign service. Neither the President nor any individual Senator has anything to gain by an open quarrel. Senatorial courtesy is therefore brought to bear only in the most serious cases of difference between President and Senate, or in instances where many Senators are displeased with the nominations desired by the President.

The question is often asked why should the Senate possess the power to approve or reject appointments? The original reason was the belief that the President needed the advice of a mature body of men, also the desire to place a limit or check upon his authority so that he could not set up a despotic power in the government; in short the theory of "checks and balances." But the plan has not worked out in practice as it was intended. It is generally conceded that the Senate should not interfere with appointments to the President's Cabinet; he is therefore given a free choice of his advisers. Also in appointments to positions located in Washington the President can usually exercise great freedom, since the very multitude of candidates from different States enables him to play off different claimants against each other; he must not ignore any one State but he is not limited to any group of men for his choice. The same is true of the diplomatic and consular service abroad; he must not openly antagonize any powerful faction but he is not compelled to accept any one candidate. There remain for consideration those Federal places which are situated in the States. The majority of these are subject to civil service appointment rules, but, where they are not, the requirement of Senatorial approval acts as a practical and real restriction of the appointing power. The more important of these places, the customs and revenue collectors, postmasters and judges, are filled on suggestion of the Senators, the less important on that of the Representatives from the district in which the particular office is located. Here again the President must not select a man who is openly hostile to the local leaders; he does not even suggest men as a rule, but he may require a number of names to be presented and exercise his preference. Generally a person who is strongly objected to by a Senator will not be nominated by the President. The strongest argument in favor of the Senatorial approval plan is that the President is induced to consult those who are best equipped to give information on political questions, viz., those whom the people have chosen as their representatives in the Federal legislature, their Senators and Representatives. The President cannot carry out his plans and policies without the

aid of a party organization, and an appointment policy which would weaken that organization or alienate from the President the leaders of the party must interfere with the success of his administration. These theoretical considerations are far outweighed by the practical record which "the advice and consent of the Senate" leaves in its trail. The President must peddle out his appointments to the chief supporters of each Senator or he must undertake a wearing and harassing struggle to urge the Senators to submit men really qualified for the service. No defender of the system by any flight of imagination could contend that it prevents the President from making bad appointments, nor that it gives the public service as efficient a class of men as the President himself would select by a merit principle with service records.<sup>1</sup> Nor can anyone conversant with our Presidential history claim that if this restraint of Senatorial consent were removed, the Executive would immediately embark upon a career of personal aggrandizement and establish a dictatorship. Are we to be saved from a czardom by forcing the President to dole and peddle out his appointments to party leaders? But if this danger does not exist, why guard against it? Countless instances are known in which men abundantly qualified for a national post of importance, who were acceptable to the President, have been quietly dropped out of consideration because they were for some reason not congenial to a Senator from their State. Even the judiciary itself has not been spared this humiliating test of "fitness" for appointment. On one occasion, a vacancy arising in a Federal judgeship, the Senator whose privilege it was to "suggest" men for the post, selected one whose local reputation was so unsavory that a deputation of members of the bar from the district immediately waited upon the President and urged him strongly to investigate with care before committing himself to the candidate proposed. The President was plainly desirous of securing a well qualified man but he also felt impelled to hold the powerful friendship of the Senator in question. The latter influence finally weighed down the scale, although one member of the deputation ventured the prophecy that the candidate if chosen would be impeached within a year. The nomination was made despite all protests; it was confirmed by the Senate and the new judge outlasted the prediction by six months. Senatorial control of appointments, in practice, is not a safeguard but a blight upon executive efficiency. No one to-day would seriously contend that it produces better civil officials.

**II. Legislation.**—To understand the true importance of the appointing power we must observe its bearing on the making of laws. Supposedly the President's influence on legislation was restricted to the veto power and the "information on the state of the Union" which he furnishes to Congress in messages from time to time in pursuance of Article II, Section 3, but in practice these latter

<sup>1</sup> See the Chapter on The Civil Service.

activities are seldom of importance. A frequent use of the veto power shows a lack of sympathy between the chief Executive and his party leaders in Congress, since the latter, if in accord with the President, would not allow the passage of measures to which he was known to be opposed. But in order to control legislation in a positive way the President must exert some influence on the introduction of bills and on the actual provisions placed in them. Precisely this influence is offered by the distribution of appointments among Senators and Representatives. The President does not barter executive appointments for Congressional votes, but his appointing power has grown to such an extent as to place his wishes in a strong light before the legislature. We should recall that the Senator or Representative is constantly harassed for appointments by his constituents. His strength at home is too often measured by the "patronage" secured from the appointing power. If he loses this patronage one of his mainstays is gone. On the other hand, the President is held responsible by the country at large for the fulfillment of a certain political program, including legislation. He must get results. Since he cannot by any possibility make a personal selection among the many candidates for appointment he follows the logical and practical course of consulting the Senators and Representatives of his party; those who are friendly to him politically and personally will naturally be consulted more than others. The circle of his friends in the Congress is extended and strengthened by the appointing power, and strong support for his legislative program arises as a matter of course. It is noticeable that much prestige is now accorded those members who are said "to voice the opinions of the administration." As abroad certain European newspapers command general attention as being "inspired" by their respective governments, so at home the utterances of certain Congressmen on special topics are known to "reflect" the views of the White House. The desire to be known as an exponent or at least a supporter of executive wishes and opinions shows to what an extent legislation has fallen under the influence of the President. It may be asked,—is this in accordance with the spirit of the Constitution? Decidedly it is not. Yet it has become a means of securing greater harmony of action between the legislative and executive branches and in this way it has proven an invaluable aid to the latter department in bringing about the passage of many useful laws. In this development the President's Cabinet advisers have shared in his growing powers. The old notion of a splendid isolation for the executive official has vanished; in its place has come the idea that to be a successful Cabinet secretary, one must influence legislation as well as manage his department.

Not a session passes without the heads of several important departments appearing before legislative committees of each House not only to give information, but actively to urge or oppose pend-

ing measures. Nor has the evolution halted at this point; forced on by the pressure of necessity, the executive officials have presumed to draft bills dealing with the field covered by their departments and have had these measures introduced in Congress and in many instances passed, by the aid of the members friendly to the administration. To those who have not closely watched this significant growth, the extent which it has already reached will be surprising. The President has always exerted much influence in law-making, but the legislative era which opened with President McKinley's first term must be considered one of the turning points in the history of the American Executive.

If we glance over the remarkable series of constructive laws passed during this period, the measures which stand out most prominently, if not by their merits, at least because of their importance, are those dealing with the Hawaiian, Porto Rican and Philippine governments, our relations to Cuba, irrigation, army re-organization, the regulation of corporations, the railway laws, the creation of departments of Commerce and Labor, the provision for an Isthmian Canal, for a permanent Census Bureau, for a permanent rural free mail delivery, the parcels post, the postal savings bank, the creation of great forest reservations, the inspections of meats, foods and drugs, the income and corporation taxes, the conservation laws, the tariff of 1913, the currency act and a host of others. Of this great array of constructive measures all were either prepared in detail by executive officials or in closest consultation with them. Can any more convincing proof be asked of the rôle played by the Executive in legislation?

**Executive Supremacy.**—The President's influence on law-making has too long been thought to be simply a result of the aggressive personality of individual Presidents. If this were correct we should find some Presidents using their influence while others refrained. But can any refrain? Executive power and "usurpation" are supposed to have reached their climax in what we call the "reign" of Theodore Roosevelt, but the real test came with his successor's administration. The latter was well known to entertain a decidedly conservative, reactionary view of the legislative function, as belonging to Congress alone. President Taft's judicial training and habit of mind, his temperament and inclination, all pointed conclusively to an old-time administration on conventional lines, in which Congress would make the laws and the President should execute them. But, suddenly confronted at the close of his first year in office, by a long session of Congress in which nothing had yet been done, he cast tradition, judicial habit and personal preference to the winds and in the memorable closing month of the session of 1909-10 he forced through every important measure, save one, that had been recommended in his annual message. No such array of "inspired" or dictated legislation had ever issued from the halls of Congress as that passed in June, 1910. And it is significant

that the President carried out his program because it was based upon a strong public opinion. Every law so passed had been a party issue in the previous election. Executive leadership does not mean the arbitrary use of one-man power but rather the President's determined insistence on the passage of popular bills. Nor may we believe that the mass of Congressional legislation is guided by the Executive; his intervention is felt only in those laws which are of prime importance. President Wilson when a teacher had written a book, *Congressional Government*, designed to show that Congress had established its supremacy in the national government, but his first official act was to call Congress in session and hold it for over a year, meanwhile forcing through a tariff, an income tax, a currency law, canal tolls and corporation acts.

This legislative activity of the Executive has always aroused strong protests. Many older members of Congress, particularly of the Senate, feel that a serious violation of the spirit of our Constitution has occurred, but the inevitableness of the change is slowly forcing itself upon us. In order to see how far we have travelled we need only review the last great public controversy on this question which was waged during the second session of the 57th Congress, when the Fowler currency bill was brought up before the Senate for action. A member of the House had tried to help the passage of the bill in the Senate, and wrote to Senator Hoar of Massachusetts stating that the measure had the approval of the President, the Secretary of the Treasury, the Comptroller of the Currency and the Director of the Mint. The Senator was so shocked that he at once arose and declared it "contrary to the privileges of the Senate to have the opinion of the President of the United States stated in legislation. The House of Commons or the House of Lords always resented it and have in history done so for a great many years, when that statement is made about the Crown." He also criticized sharply the growing custom of holding conferences at the White House in which Senators arrange "with the President of the United States what the Senate shall do about a treaty or about a trust bill." The press comments on this speech were remarkable, showing as they did, the extent to which the leaders of public opinion sided with the President over ten years ago in what is undoubtedly a serious encroachment upon legislative prerogatives. Among others a former Cabinet officer, Charles Emory Smith, to whose view much importance was attached, showed clearly the character and tendency of the present system. Writing in the *Saturday Evening Post* of February 21, 1903, Mr. Smith who was a Republican newspaper editor said:—"Senator Hoar's remonstrance against the intrusion of Presidential authority and influence into the activity and legislation of Congress finds theoretical assent and practical rejection. The venerable Massachusetts statesman is a Senator of the old school. He has great reverence for the traditions of the fathers, for the fundamental



principles of our political system, and for the constitutional division and boundaries of authority. The President, according to his view, is to communicate with Congress by message; he is to pass upon bills by signing or vetoing them when they come regularly before him in due process; Congress is to legislate without his interference except through his public recommendations; and conference at the White House to arrange what shall be done at the Capitol, and announcements that this or that measure is an Administration measure, are equally objectionable.

"All this Senator Hoar found occasion to utter in very plain terms. 'There is a constitutional method,' he said, 'by which the President conveys his approbation or disapproval of bills. It is nobody's business to be arranging with the President what the Senate shall do. We are an independent body.' This was indeed a sharp lecture both to the President and to the Senate. And the general judgment found expression, when, upon its conclusion, Senator Spooner rose and said: 'Mr. President, the Senator from Massachusetts is absolutely right, of course. I move that the Senate do now adjourn.' That was the only rejoinder. Theoretically right, but not worth answering.

"Senator Spooner's suggestive response reflects the truth. Senator Hoar's position is technically correct, but practically erroneous. It goes back to the original constructive division of powers and overlooks the development of actual conditions. The real working of our political system has changed in this as in many other ways without any change in the text of the Constitution. The President is not merely the Executive but the Premier of the Government and the leader of his party. If he would win either administrative or political success he must impress himself on Congress and mold its action. The President who failed to do this would discredit himself and imperil his party. Once in a century comes a Henry Clay who from his place in the Senate dominates his party in Congress and in the country; but it is only at the rarest intervals that such an over-towering Congressional leader appears, and generally the real leadership must fall to the President."

Senator Cummins has recently attempted in vain to stem the rising tide of executive authority by asking that the President's power of appointment be limited or diverted in such a way as to strip him of his control over legislation but it is doubtful if any of the leading parties would be willing to consider this plan seriously, in view of the weakness which would immediately develop in the party's legislative program.<sup>1</sup>

<sup>1</sup> In an article entitled "The President's Influence a Menace," *The Independent*, June 1, 1914, Senator Cummins says:

"The President passed the tariff law. The President passed the currency bill. The President is now summoning all his power to compel Congress to repeal so much of the Panama Canal Act as exempts our coastwise trade from the payment of tolls for passage through the waterway. It is highly probable that he will succeed in accomplishing his purpose, for while there is some independ'

It has frequently been proposed that the President and the heads of departments be given the right to appear in either House and advocate measures of general importance. Such a recommendation was made by a Senate committee in 1881. It has also been suggested that the various underground means of communication between inferior executive officers and the Congress should be abandoned by concentrating them in the hands of department heads, after the English fashion. If these changes were made the President and his Cabinet members would have a still stronger means of choosing essential measures out of the mass of legislation, holding them up before Congress and the people and focusing public attention upon them. At the same time it would become impossible for petty officials to lobby secretly for their personal benefit and the advantage of their own little offices. This later practice has become so general as to disorganize some of the departments and relax their discipline. The change would have the effect of forcing out into the open the relations between executive and legislative departments and giving legal recognition to the present influence of the Executive in law-making.

**Growing Importance of our Foreign Policy.**—As the foreign relations of the United States expand there is a notable increase in the number of affairs which require the constant every-day attention of the administrative authorities. There are more Americans travelling and living abroad than ever before, and when they fall into difficulty they appeal to our diplomatic representative. There are new inventions and new trade conditions arising on which our consuls should report to the home government for the benefit of American business men. There may be a boycott against American goods in China which is injuring our manufacturers, or a rumored government discrimination against American products elsewhere, hence still left in the Democratic majority, it is not strong enough to resist the power of the presidential office. (The Exemption Repeal Act was passed in June 1914, in slightly amended form.)

“Congress will never again be as free as it should be until we devise some other plan for the appointment of the officers and agents of the Government who are to carry into effect the laws which Congress enacts. The patronage of any President has become a menace to legislative independence and gives the executive a power over legislation that no executive ought to possess.

“The Constitution gives to the President the sole authority to appoint the officers who are to administer federal affairs. Originally this was not considered a serious matter. The people who adopted the Constitution had no conception of our future growth and development. The mere physical transformation of a hundred and twenty-five years bewilders the most comprehensive mind, but multiplied population, wealth and commerce do not half tell the story of the increased activities and powers of the Government. I cannot even suggest the expansion which this generation has witnessed. It has not only added and added again to the number of officers and employees, but has in geometrical ratio added to their importance and influence in the lives of the people. With the exception of minor employees the President selects all these aides, and every member of Congress, for reasons which need not be named, is highly concerned in the selections that are made. To use the familiar term, it is patronage, and it has become a menace to the free action of the Congress.”

which action must then be officially investigated. An American ship may have been attacked in foreign waters by marauders. A German-American returning to the Vaterland may have been arrested and compelled to serve in the army, our Secretary of State may try to secure the open door for trade in China, etc. Our capital and our business interests at any moment involve us in such difficulties as we have already observed in Mexico, Europe or Central America. These are all matters involving, not the adoption of a treaty, nor the approval of the Senate, but the constant watchfulness and care of the Executive. In this way the President has gained in power and influence by the recent growth of our foreign relations. The strongest reason for this is the increase of our export trade due to the expansion of home manufactures. So long as the United States remained an importing nation her foreign policy was extremely limited, and might well be summed up in the familiar precept of George Washington, to avoid entangling alliances with foreign powers; but the growth of American exports has involved the nation in a new set of relations abroad. We are gradually learning to exchange the distant and arrogant attitude of the buyer for the more suave and courteous manners of the seller. We have considerably more to lose in our foreign relations than at any time since the Civil War, and we have also incomparably more to gain. The revolutions of our neighbors are ceasing to be matters of indifference to us, the closing of Chinese ports to our cotton goods or the indirect restriction of our markets under one pretext or another by the nations controlling various sections of Asiatic territory, is a matter of immediate concern, while the protection of our citizens abroad is of growing importance and difficulty.

All these increasing points of contact with foreign peoples have given the basis for a new foreign policy. We want our government to play a more active part in the council of nations and to be prepared to protect and foster our interests in every quarter of the globe. This change in our program tends distinctly toward a strengthening of that branch of the government which is always in session, constantly on the alert and ready to act at a moment's notice. It cannot be doubted that it was the President who originated all the important moves in our disagreement with Mexico. If we take the history of the Monroe doctrine, it will be seen that this declaration of opinion and intention contained in a Presidential message of nearly a century ago, has placed the Executive in a position of unusual prominence and influence and that the commercial forces which have increased the importance of the doctrine have by the same fact exalted the Presidential power. The Senate, being a deliberative council, is unable to enter into all those minute yet important developments which form the greater part of the daily conduct of affairs; the President and his officials are therefore obliged to undertake this growing side of governmental activity.

**Foreign Policy.**—The management of our foreign relations falls naturally under five general heads, each possessing certain peculiar and interesting features.<sup>1</sup>

A. Appointment of (a) diplomatic and (b) consular representatives.

B. Treaty-making.

C. War power.

D. Recognition of new nations claiming independence, or of hostile factions claiming control in a foreign government.

E. General negotiations and communications with foreign powers.

Modern conditions have tended to throw practically all of these powers more and more into the control of the President.

**A. The Diplomatic Service.**—The United States has not yet adopted the policy long practiced by other nations of establishing a professional diplomatic corps, with members trained by years of experience. For our foreign business we have availed ourselves of the services of prominent merchants, lawyers, journalists and others. While it is by no means certain that we should improve matters by establishing a permanent, professional corps in all branches of the staff, it does seem advisable to retain experienced men longer in their posts and to make the service permanent for those who show conspicuous ability. The diplomatic service is composed of various grades, the order being Ambassador, Minister Plenipotentiary and Minister Resident. There are only eleven embassies, one to each of the most important powers with whom we have dealings, viz., England, Russia, Germany, France, Italy, Austria-Hungary, Mexico, Japan, Spain, Turkey, and Brazil, Ministers Plenipotentiary or Resident being sent to other countries. Seven of the eleven Ambassadors were changed during 1913, and twenty-two of the thirty-five Ministers. At each embassy there are a number of secretaries and attachés. The salaries of Ambassadors vary from \$12,000 to \$17,000, of Ministers from \$4,000 to \$12,000, but large as these amounts appear, they are by no means sufficient to cover the expenses of the positions. In fact so inadequate is the salary, that practically all our representatives abroad have to devote their private funds to the support of their positions; it follows that only wealthy men can retain these posts for any length of time. A heavy item of expenditure is the rental of the embassy,—other nations own their official residences and offices

<sup>1</sup> The President's constitutional control over foreign affairs rests upon those clauses of Sections 2 and 3 of Article 2, authorizing him, first, to make treaties by and with the advice of the Senate, provided two-thirds of the Senators present concur; second, to nominate, and by and with the advice and consent of the Senate, appoint ambassadors, other public ministers and consuls; and third, to receive ambassadors and other public ministers. The first and second of these clauses form a basis for the additional power of conducting negotiations on all subjects affecting international relations even though such negotiations are not intended to lead to a treaty or agreement.

and thereby relieve their representatives of this expense. A more liberal policy by our government would make it possible to appoint men of less wealth when this seemed desirable.

The control exerted by the President over these diplomatic appointments is considerable. As we have already seen, the requirement of Senatorial approval prevents the appointment of anyone who is strongly opposed by the political leaders of his State. But aside from this, the President has almost a free choice.

**The Consular Service.**—In the consular service the President's freedom is usually limited by the urgent practical necessity of providing for political workers. The grades in this service are, Consul-General, Consul, and Consular Agent, the salaries of the 241 Consuls ranging from \$2,000 to \$9,000, those of the 57 Consuls-General from \$3,000 to \$12,000. The 224 Agents are paid by fees. If, as has been suggested, these positions were placed under civil service rules, a permanent and professional body of trained consular experts would be established. The principal duties are to report on opportunities for extension of American trade abroad and protect American citizens and their interests when threatened by danger. A large number of appointees to these places are newspaper men, whose journalistic experience stands them in good stead in securing commercial information of value, and it is probably this fact that has made our consular service so efficient, in spite of the political method of recruiting its members. By a plan of appointment recently adopted, the higher positions are to be filled as a rule by promotion, and civil service examinations are held for appointment to the office of Consular Agent.

**B. Treaties.**—The constitutional provision requiring the assent of two-thirds of the Senators present, for the approval of any treaty negotiated by the President, lays upon the latter an effective restriction in his conduct of foreign affairs. The Senate uses its controlling power freely, and many of the treaties negotiated fail of Senatorial approval. Notable in recent years has been the failure of the highly important and valuable treaties negotiated by Mr. Kasson, President McKinley's Reciprocity Commissioner, the treaty for the purchase of the Danish West Indies and the Arbitration agreement with Great Britain. The Senate has always looked upon itself as a co-ordinate part of the treaty-making machinery; it has not restricted its activity to approving or rejecting the proposals of the President and his Secretary of State but has often proceeded to make a new draft of treaty for transmission to the foreign government through the executive offices. Realizing the independence of the Senate in this respect, it has become the custom of the Executive to consult the chairman and leading members of the Senate Committee on Foreign Relations regarding any important steps, and to keep them well informed of the progress of negotiations on treaties.

The original grounds for requiring a majority of *two-thirds* for

the approval of treaties were strong. Since a treaty was a binding agreement involving the good faith of the national government, it was of the highest importance that the Executive should have the advice and co-operation of the more conservative branch of the legislature, which would not lightly enter into such agreements without sufficient reasons. All possible precautions were thereby taken against a vacillating or impetuous foreign policy. The arrangement worked well, although few instances can be recorded in which the Executive might be accused of hasty action. In later years, however, the needs of the people have changed considerably and the treaty-making power must be considered from a different standpoint. Since we are obliged to enter more frequently into agreements with foreign peoples we must regard our treaty-making machinery more with a view to producing results than of merely preventing hasty action. It is hard to believe that our Executive is to be less trusted than those of other nations. In no other great world power is a majority of two-thirds of the upper house required for the approval of international agreements. This requirement together with the right of unlimited debate in the upper house seems to give to a small group of men too much power to delay and block action on important measures and as it becomes more necessary to enter into trade arrangements with other countries we require a more effective method of treaty-making. To this end the suggestion has been made that treaties be approved by a simple majority of *both* Houses. This would be an easier method than the present two-thirds rule in the Senate and yet it would fully safeguard all interests concerned.

Another limitation of the President's treaty-making authority has arisen in the well-known claim of the House of Representatives to the approval or rejection of treaties. This claim rests on two bases: first, the right of the House to take part in appropriations. Since all important treaties require an appropriation for their execution, this claim practically amounts to the demand for a part in all international agreements. Second, it is contended that no treaty may amend the customs tariff and tax laws of the United States without the consent of the House of Representatives since the latter is peculiarly the popular representative assembly and has been given both by custom and by the Constitution a special care over taxation. The Senate has not formally admitted this claim but in order to get funds it has placated the House by passing appropriation laws to carry out the treaties adopted. The President too has been obliged to keep in touch with the House Committee on Foreign Relations, and where an appropriation is necessary the concurrence of the House is asked.

**Treaties and State Laws.**—The occasional conflict of the Federal treaty power with the legislative powers of the States raises the question:—Can the United States government make a treaty which conflicts with State laws? The necessity of such treaties is increas-

ing with the commercial expansion of the country. It has been provided by treaty that the property of deceased foreigners located in the United States shall be administered in a certain way. Also, that citizens of certain nations shall be free to acquire real estate within the United States. Both of these conflict with the laws of some of the States, and authorities are divided on the question. (See *Geofroy v. Riggs*, 133 U. S. 258; *Baldwin v. Franks*, 120 U. S. 678.) In 1907 and 1908 a number of Japanese children living in California were excluded from the public schools or were forced to attend separate schools. The Japanese government maintained that this was a violation of its treaty rights and the same constitutional question arose in acute form. The President maintained that the Federal Government had the authority to enforce an equal treatment of the Japanese with that accorded other persons in the school system, but this claim was not pressed because of the aroused public sentiment throughout California. Eventually a compromise was effected, leaving the constitutional question undecided. The same problem has often taken a serious turn in the failure of the State governments to protect foreign subjects from mob violence; the Federal authorities have then been obliged to pay indemnities to the nations concerned while still remaining in the humiliating position of political impotence. It is of the essence of a treaty to offer protection and full enjoyment of civil rights to the subjects of a nation in return for similar privileges granted to our citizens, but what do these rights avail if our Federal Government must plead with the States to protect them? Has the national authority no power to step in where necessary and compel the observance of its treaties regardless of local laws and feeling? On the other hand, can it by treaty repeal the constitutional legislation of a State, so far as that legislation applies to foreigners? This is one of the unsettled questions of our Constitution. It may be pointed out that if our foreign relations are to expand and to rest upon a foundation of mutual confidence, we must allow the Federal Government to use its treaty power without such excessive restrictions. Certainly we should treat with scant respect a foreign government which answered our demand for the full protection of Americans within its borders by pleading that it was a Federal system, and that its component States, for political reasons must not be interfered with by the national authority. Undoubtedly we have the constitutional authority to protect the lives of aliens but we never make use of it, nor have we ever established how far the property rights of foreigners may be regulated by treaty or Congressional act. The laws of several Pacific slope States still deny the right of land-owning to any aliens who cannot become naturalized and this violation of our Japanese and Chinese treaties has never been settled because the national authorities want to avoid serious conflicts with the States. Doubtless the State acts are invalid because of the conflict.

**C. Declaration of War.**—Article I, Section 8 of the Constitution, gives to Congress the power to declare war. On two of the occasions when such a declaration has been made, viz., against England and Spain respectively, there has been an intense popular excitement which drove the legislature to take such a step, yet it is an interesting fact that practically all the more important measures, leading to an outbreak of hostilities or determining the exact moment at which they should commence, were either directly taken by the President or inspired by him. The American President may not declare war but he may lead the country to the verge of hostilities or even into a situation where war is inevitable, as, on the other hand, he may also prevent a conflict. The severe hostilities between England and France during Washington's second administration were drawing us rapidly into a combat with the former power, which was prevented largely by the President's efforts; the arrogance of the French subsequently brought on a similar danger with that country which was again averted by executive influence. The strong declaration of President Cleveland in favor of arbitration of the boundary dispute between Venezuela and England placed the United States and Great Britain unexpectedly in a position where one or the other must openly recede from its announced intention, if a conflict was to be averted. The case was finally settled by Great Britain's conciliatory agreement to arbitrate. The action of the President in the Mexican imbroglio, and its consequences, are too recent to require comment. The policy of the Executive in all these cases has been decisive. While there is in every country a strong under-current of national pride and "jingoism" which may be relied on by the President in an aggressive foreign policy, and while this knowledge might at some time lead the Executive to hasty action, yet our Presidents have usually acted with conservatism. There is no other official body in the government to whom this power over foreign relations might be entrusted. The only alternative would be to vest this control in a Congressional committee—an arrangement which during the Revolution proved most unsatisfactory and even dangerous. Congress at critical moments is likely to be even more radical than the President and his advisers. In the Spanish War Presidents Cleveland and McKinley kept the national legislature from a declaration of hostilities for more than two years before final action was taken. From the very nature of the control over foreign relations it follows that either Congress or the President must sooner or later gain the upper hand in the exercise of such a power. This advantage usually rests with the President because he enjoys the initiative in proposing, interpreting and executing our international treaties.

**D. Recognition of Foreign Powers.**—The Constitution framers could not foresee the many delicate questions touching the recognition of the independence of new republics which would be thrust upon our government in its management of foreign affairs; had



they done so they would probably have defined the power of recognition more clearly. Congress has repeatedly undertaken to exercise this power, sometimes in conflict with the President, but a final and definite decision of the matter has never been reached. In practice the victory has thus far been with the President. In the Cuban case an excited popular opinion throughout the United States seemed strongly in favor of recognizing not only the rights of Cuba as a belligerent, in its struggle against the Spanish yoke, but also of recognizing Cuban independence. President Cleveland, knowing that the United States was unprepared for war, with his characteristic independence, threw all his influence against action by Congress, and his Attorney General in an opinion which commanded general respect declared that the Constitution conferred this power upon the President when it authorized him in Article II, Section III, to receive ambassadors and other public ministers. The Congressional leaders allowed the matter to rest here, the President refused to receive as public ministers any deputation from Cuba and the formal recognition of Cuban independence was put aside until the United States was enabled by force of arms to compel the withdrawal of Spanish sovereignty. During the Boer War with England a Boer delegation was also sent to Washington to secure a formal recognition of the struggling republics by the United States. It was attempted to obtain either a recognition of the independence of the Transvaal and Orange River State, or failing that, a declaration that the United States would accord them the rights of belligerents in their conflicts with England so that they might make purchases of supplies and material in America. The President, however, only consented to receive them informally and not as the representatives of foreign powers. But the most striking illustration of the broad influence of this power is offered by our relations to Mexico. The refusal to recognize General Huerta led to the recall of the Mexican chargé and of our acting ambassador. The recall of our ambassador created a vacancy in our embassy which could not be filled without recognizing Huerta, since we must send our ambassador with credentials addressed to someone in authority and Huerta was the only authority. When the Carranza revolution grew to large proportions, its leader applied to the United States repeatedly, demanding recognition as a representative of the constitutional authority of the nation. It was for this reason that the insurgents took the name of Constitutionalists, claiming to re-establish legal government under the constitution, which had been overthrown by Huerta. They too were refused recognition by the President pending the final outcome of the war. Special agents of the United States communicated with and visited both factions from time to time but not as accredited diplomatic representatives. We were therefore carrying on active negotiations with a people over whom we recognized no legal head.

#### **E. Negotiations and Communications with Foreign Powers.—**

This is the every-day work of our international relations and it is the part in which the President enjoys the widest freedom from restraint. Aside from the long and complex negotiations incident to treaties, there is the constant interchange of communications necessary for the protection and advancement of American interests under the treaties already made and under the general international law of custom. Whether it be the exacting of an "Oriental promise" regarding Manchurian trade, the presentation at Constantinople of a bill of damages for the destruction of American property in Turkey, the statement of our opinion and interest in European methods of collecting debts in Venezuela, our concern at the treatment of Jewish subjects in Russia or our demands for greater safety for our citizens in Mexico—the President, through his Secretary of State, fixes the substance, the form, the time and the tone of the communication and thereby determines the official attitude of the United States. In so doing he commits the nation to a policy from which the legislative department can hardly depart without provoking a serious political conflict at home or diminishing our respect abroad. The President feels it expedient, if not obligatory, to consult with some of the party leaders before taking a positive stand on the most important international questions. As the treaty-making power is legislative in character, the President's power of communication is also the administrative and interpretative side of our foreign relations.

**A Constructive Foreign Policy.**—We are slowly groping our way towards a much needed definite foreign policy. Heretofore our foreign relations have been determined entirely by the whim of the moment but without any fixed, settled principles of action. We have had no definite aims in view nor have we pursued a consistent course toward any of the nations with whom we were in constant contact. While this has apparently possessed advantages in freeing us from any alliances, it has not left us free from entanglements arising from the very nature of our foreign problems. Towards the continent of Europe we have always showed a desire to avoid friendships. In China and Asia generally we have, at various times, attempted to extend our markets in a spasmodic way but have never followed up our own announcements of programs and principles. Towards the Central and South American peoples we have shown a desire to be friendly and to protect them from European aggression and even at times from domestic chaos and disorder, but to this day, no foreign nation, whether in Europe, Asia or South America, is aware of any definite, positive principles guiding our course of action, upon which they may rely with confidence.

The Hon. W. Morgan Shuster in an address before the American Academy of Political and Social Science<sup>1</sup> has set forth certain essential factors of a foreign policy which well deserve consideration. These briefly summarized are:

<sup>1</sup> See *Annals of American Academy*, July, 1914.

A. It must represent the collective business and moral sentiment of the people,—since all the foreign negotiations and treaties of our government are discussed with the greatest freedom in the press, by public societies, and in open debate in Congress. Our authorities would not consider for a moment the enactment of a treaty which was opposed by a strong public sentiment. Because we are a popular government, we must also reckon with the prevailing moral tone of our people in national affairs. It is safe to say that no notoriously dishonest or immoral policy could long maintain the popular support.

B. A constructive foreign policy must also have some permanence and continuity,—if it is to be a guide to us in dealing with other nations and to other nations in their policy toward us, it must be non-partisan and must be consistently followed within certain general limits by administrations of all parties. This involves some change of our sentiment of patriotism from mere military enthusiasm to the development of a high ideal of national honor and international justice.

C. It follows from "A" that we must scrupulously respect the sovereignty of small nations and

D. Observe with greatest care the exact spirit of our treaties, avoiding even the appearance of neglect or sharp practice in interpreting our obligations toward other peoples.

E. And our policy should take heed of our peculiar position in the Western Hemisphere,—it should build with greatest care a feeling of confidence among the peoples of South and Central America.

F. To this end our intervention in their affairs should be confined to a minimum and should occur only as a last resort for the protection of our interests, and we should avoid all permanent occupation of their territory.

G. Our foreign policy should be altruistic and generous but it should also have as one of its chief aims the promotion and protection of American investments abroad.

IV. **General Enforcement of the Laws.**—A similar change has taken place in the general executive authority of the President. In our early history when the government was limited in activity, we paid little attention to executive powers, because the making of the laws seemed all-important. The people fixed their attention upon the broader, more imposing and impressive aspects of the government, assuming that the executive work would prove a mere matter of detail. It was not until, by the gradual rise of manufactures and transportation, a wide and complex field of public regulation had developed, that the execution of the law began to stand on a par with the passing of bills, in the minds of the people. When the men of 1787 placed in Section 3, Article 2 of the Constitution the clause "He shall take care that the laws be faithfully executed," they doubtless considered that they had

clearly fixed the subordinate position of the Executive. The word "faithfully" is significant. It shows the President's intended rôle as the true and obedient administrator of the legislative will; and in the enforced separation between the two departments, the President has done what he could to carry out this faithful execution of the laws. No more impressive instance can be given than that of Andrew Johnson in 1866, attempting against his own judgment to enforce the pernicious Reconstruction Acts, which Congress had passed over his veto. But since Johnson's time a new era has set in, and the President's political duty is now not only to enforce the laws but to see that good laws are enacted.

**Executive Discretion.**—Thirty years ago Congress enacted all its laws in detail, prescribing with jealous care the most minute punctilio of the subject-matter; to-day Congress is too busy to go into details,—it accordingly passes what we might call outline acts, which lay down certain fundamental principles and direct the Executive to apply these principles. The President is free to choose any reasonable means in order to carry out the aims of the act,—he or his department heads issue ordinances or regulations covering all the details of legislation, and these ordinances are as binding as the law itself—they are in fact the law. At other times, Congress being for the moment unable to cope with a temporary emergency passes over to the President the authority to manage the situation for a limited time. Congress alone possesses the power to legislate for the dependencies and territories of the United States, but for three years the most important of these, the Philippines, were handed over to the President and his appointees on the Philippine Commission. When, by the Act of 1902, a new system of representative government was provided for the Islands, the President, through his officials in the upper house of the Philippine Legislature, was still left in a controlling position in the insular government. When the United States first secured the Panama Canal strip, the Senate drew up with painstaking care a complete system of government for that district, but after much discussion the plan was abandoned and the canal zone, like the Philippines, was handed over to the President's control with instructions to dig the canal as best he could. The Pension Office has for many years been the target of criticism because of the use which the Pension Commissioner makes of his discretionary powers in interpreting and enforcing the law. Each Commissioner is known to favor a "strict" or "broad" interpretation of the acts; a former Commissioner issued an order on "Total Disability," declaring that a veteran upon reaching the age of seventy-two would be presumed to be incapacitated for active labor and would thereupon be placed upon the Total Disability list and given the full rate of pension without further examination. The Postmaster-General in his department exercises undisputed sway, under the law, in the issue of regulations for the postal service. One of his Assistants even determines

whether certain postal matter is "fraudulent" or "obscene" and, as such, is to be excluded from the mails. The Secretary of the Treasury may issue or retire a large amount of United States bonds in a manner and at a time which will have important effects upon the business community; <sup>1</sup> he could formerly decide what grade of securities should be accepted as collateral for the issue of bank-notes. All these examples, which might be multiplied indefinitely, show that while Congress maintains its supremacy in fixing the broad general outlines of our policy, the substance and content of that policy are left, to a surprising extent to the Executive. Congress, with its growing duties, can only draft and supervise, the President and his assistants fill in the outline. Here then is the cause of the great discretionary power of the executive officer. It has produced a change in our administrative system towards greater elasticity and adaptability, two qualities that are especially needed at the present time. They are difficult to secure because the government being a non-competitive concern, naturally settles into a rut or routine of red tape and rigidity, which prevents it from keeping up with the new conditions unless constantly stimulated.

If we compare the government business with that of any great commercial corporation we find that the corporation can measure its success by its profits at the end of the year. It has this simple test of results constantly before it. A defect in any part of the system is detected by the accounting department and is remedied immediately, before a further money loss occurs. Spurred on by this practical measure—financial results—the corporation is constantly revising its methods and plant, improving its personnel and developing new opportunities for profit. It is a live, elastic and rapidly changing organization whose very life depends upon its keeping up with new conditions and whose whole spirit is that of progress. Not so the government. The public administrator is beset with fixed, though general, rules, his success usually is measured not by results, but by *compliance with the rules*; he must carry out the law even where the law is inexpedient and at the end of the year he can point to no definite money gain or loss resulting from his operations. For these reasons the urgent need of our government administration to-day is greater elasticity and freedom to conform to new conditions and a clearer, more definite test of results. In this sense the new freedom which the Executive enjoys is a great advantage to the community; it enables him to adopt modern methods, to change with the rise of new circumstances and to keep the administration thoroughly up to date. The State and

<sup>1</sup> When in 1913 rumors of a panic arose and business stagnation set in during the extended tariff debates in Congress, Secretary McAdoo announced that he would prevent a money stringency by selling \$50,000,000 of Government bonds and by depositing the proceeds of the sale with national banks in agricultural sections, in order to aid the marketing of the farmers' crops.

city executives are even forced to go one step farther and to choose which of the laws they will enforce.

**Means of Enforcing the Law.**—The President has at his disposal for the execution of the law, the courts and the armed forces of the United States, including the State militia when the latter is required to suppress an insurrection. In our early history the use of an armed force was more familiar than at present, because of inherited traditions. In the monarchical countries of the Continent the frequent resort to physical force by the executive is a marked feature of government.<sup>1</sup> Early in the history of our country President Washington had to cope with a serious, organized attempt to violate the tax-laws of the United States in western Pennsylvania. The internal tax on distilled spirits fell with special weight upon the people of that section and all classes organized to resist the collection of the tax. The movement assumed such proportions as to threaten an insurrection and the President sent a force of fifteen thousand troops under General Lee to suppress opposition and compel obedience to the law. The most recent employment of this means on a large scale to execute the Federal laws was in the case of the American Railway Union strike in 1894. A strike having broken out in the Pullman Palace Car Works at Pullman, Illinois, the American Railway Union refused to move trains to which Pullman cars were attached, and a disastrous general tie-up of the railways centering in Chicago followed. Although an ordinary strike in itself is legal, in this case it was accompanied by rioting; finally mail-trains were blocked by violence, and President Cleveland ordered United States troops to Chicago to protect them and to enforce the Federal postal laws. These cases attracted widespread attention and much criticism because of the rarity of the occasion and some popular sympathy with those in resistance, but there is no doubt of the constitutional power of the Executive to use armed force. In the State governments, such an exercise of force is more frequent but is usually required less for the purpose of carrying out a positive law than to quell insurrection and riot.

**The Injunction.**—Where damage to property is feared as in case of a riot or organized violence, the threatened property-holder usually applies to the court for an injunction. This is a writ issued by the court<sup>2</sup> either to particular persons mentioned by name or to all persons whomsoever, forbidding them to commit any act which will interfere with the property in danger. This injunction is then published or "served," and upon such service becomes bind-

<sup>1</sup> The German process of forcible execution ("*Zwangs-Vollstreckung*") of law places far-reaching military powers in the hands of the executive official as does also the French *droit administratif*; and these powers are used in a way that to Americans would seem obnoxious. But it must be recalled that in the countries named, as on the Continent generally, the military influence is strong and in Germany particularly there is a pronounced preference for "rattling the sabre."

<sup>2</sup> See the Chapter on The Judiciary.

ing on all parties mentioned in the writ. Any person disobeying this writ is liable to immediate arrest and punishment for contempt of court, either by fine or imprisonment or both. The injunction is often asked for by the Executive to compel obedience to a law, one of the most notable instances being the celebrated labor case *In re Debs*, 158 U. S. 564, decided 1895, which arose in the Pullman strike in Chicago in 1894 already described above. In this case Eugene V. Debs, President of the American Railway Union, on the petition of the U. S. District Attorney was enjoined by the United States Circuit Court, from combining or conspiring with other persons to obstruct the rails, tracks, engines and trains of certain railways engaged in interstate commerce and in carrying United States mails. Debs and other members of the American Railway Union and "All other persons" were forbidden by the injunction from so conspiring to commit such damage to property and to the mails. After the injunction was issued the violence continued and Debs and four of his fellow officers in the Union accused of disobedience to the injunction, were brought before the Circuit Court, and on December 14, 1894, they were found guilty of contempt and sentenced to imprisonment in the county jail for terms varying from three to six months. They appealed to the Supreme Court of the United States which upheld the lower court in all respects and declared the injunction to have been properly issued in order to protect the property of the United States and to prevent interference with the postal laws.

The use of the courts to enforce Federal laws has now become the principal mainstay of the Executive when faced by serious opposition. The employment of the military inevitably creates a deep and painful impression on the public at large, while with those in resistance it leaves an irritation and a rankling hostility to the constituted government which require years to overcome. Rather than have direct resort to physical force, therefore, the Executive usually appeals directly to the courts and secures the added prestige of a court order, executed by the United States marshal. Should a weak Executive avoid the issue, and fail to enforce the laws, the private parties affected must then undertake the burden of securing a writ from the proper court. Many of the injunctions issued by our courts would be unnecessary if the proper executive officials took upon themselves the full powers and duties conferred by law.

**V. Command of Military and Naval Forces.**—<sup>1</sup> To many it may seem that the war powers of the President should be ranked first in importance; they are unquestionably the most extensive in scope and irresistible in sway, placing him in the position of a temporary dictator. Yet they are but temporary. What a striking proof of this is furnished by the wars of 1861 and 1898! From the command

<sup>1</sup> The question of army administration is discussed in the Chapter on The War Power of Congress.

of hundreds of thousands of men this power fell within one or two years to the control of a handful in the regular army; from the unquestioned military sway over the lives, property and liberty of millions of people in 1861-65, the central authority shrank to a joint legislative and executive control over a few districts in the South, waiting to be re-incorporated in the Union. Great and irresponsible as are the military powers of the President, imminent as seems the possibility that he may in time of crisis violate even the Constitution itself, we must acknowledge that the tide of power ebbs even more swiftly than it rises, leaving the President with more prestige perhaps, but with no increase of authority.<sup>1</sup> Public opinion demands the reduction of military expenses and the return to their homes of the men who have volunteered for the war. In the face of this demand no scheme for military dictatorship could survive.

Of the remaining powers of the President, three deserve special mention, his message to Congress, his veto power, and his duty to protect a State against invasion and domestic violence.

**The Annual Message.**—The President's influence on law-making has not developed along that line which at first glance seems to offer the most natural means of growth, that is, his annual message. The value of the message has even declined. The annual communications of earlier Presidents were documents of the highest importance. They were in very fact "information of the state of Union," to quote the words of the Constitution and as such received the grave consideration of the Congress, being answered and discussed oftentimes in detail. And to the people at large the President's message was "information."

The roads and means of communication of the country at the time were so undeveloped that a large percentage of the people received their first official news of important national questions from the President's message; but the telegraph and the hourly newspaper edition have removed us far from this state of affairs and the message may now only be called "information" by courtesy. Not only is it devoid of news, but it is intentionally made so general in character as often to lose point; sometimes it does not even "recommend . . . such measures as he shall judge necessary and expedient," but simply calls the attention of Congress to a situation in such a tone as to imply that the legislature had the entire responsibility for the measures to be taken. This apparent anxiety to avoid any possible suggestion of interference with the prerogatives of the legislature might appear almost ironical in view of the attempts made by the Executive to influence legislation; but there is a certain consistency in the attitude. The legislative efforts of the President are often indirect and even secret. Individual Congressmen are willing and even

<sup>1</sup> The military power to govern territories acquired by war is also only temporary.



glad to represent the views of the Executive, but Congress as a body immediately resents any open or public attempt to dictate laws; and while the whole substance of things now points to executive leadership in legislation, the form of Congressional independence and sovereignty must be scrupulously maintained. The real importance of a message is now to be seen not in the annual communication sent to Congress in December, but on occasions when a special session is called or when the President sends a special note to Congress, dealing with a single occurrence requiring immediate legislative action. Good recent examples of this are President McKinley's and Wilson's tariff messages at the special sessions in March, 1897 and 1913, and President Roosevelt's note to the Senate regarding the Cuban Reciprocity Treaty in the special Senate session early in 1903. In all these cases the communication led to action by the bodies addressed. Paradoxical as it seems, the reason for diminished value of the President's message lies in the increased influence of the Executive and his closer relations with Congress. So long as he remained in a position of "magnificent isolation," his formal communications with Congress must necessarily be important, signifying as they did his principal if not his sole positive means of touching the field of prospective law-making. But since the President has left this pedestal of isolation and now undertakes to participate freely and informally in the legislative program of the time, his authority can be made a thousandfold more effective by the personal "conference" at the White House than by a ponderous and formal message. Instead of addressing Congress from a distance each new President now sends for the party leaders and tells them politely but clearly what should be done. And it is done.

What then, is the real importance of the message to-day? Briefly, it is that of an annual proclamation to the country at large, setting forth what the President believes to be the principal problems of the time. President Wilson revived the business-like method of personally reading his communications on important subjects to the assembled House and Senate. If, as now seems probable, greater emphasis were put upon the special message, limited to a single subject and presenting a pointed definite suggestion on that subject, the legislative influence of the President's communications would be greatly enhanced.

**The Veto.**—As a bill passes each House of Congress it is signed by the presiding officer, the signature being attested by the clerk or secretary. Having passed both, it is sent to the President and signed and dated by him; the date which he gives it determines the time at which it becomes law unless the bill itself provides otherwise. If the President vetoes it, he writes upon it simply the word "veto" (I forbid) and returns it to the house in which it originated with a brief summary of his reasons. According to Article I, Section VII, Clause II, the President is given 10 days, not counting

Sundays, in which to sign or veto a bill. If he takes no action in that time and Congress is still in session the bill becomes a law without his signature but if Congress has adjourned within the ten-day period and thereby prevented him from returning it, the bill fails of enactment. This is the "pocket veto." Some of the earlier Presidents considered that the purpose of the veto was to prevent the passage of unconstitutional legislation, but our later executives have taken the broader view that the President may use his right on any ground of public policy that he sees fit, and that it is his duty to act as an independent factor in legislation. These same Presidents, notably Cleveland, Taft and Roosevelt, have frequently forced the amendment of pending bills in Congress by letting it be known that they would veto the measures unless changed to conform with the executive views. While the simple statement of this power seems arbitrary, it has not been so used by the executives in question but has rather been employed by them to hold the majority legislators to a stricter observance of the party's pledges.

**Protection of States.**—The duty of the President to protect the States against invasion and domestic violence is founded upon Section 4 of Article 4 of the Constitution which provides:—

"The United States shall guarantee to every State in this Union a republican form of government and shall protect each of them against invasion, and on application of the legislature, or of the Executive (when the legislature cannot be convened) against domestic violence."

Under the decisions of the Federal Supreme Court Congress may decide when a republican form of government exists in a State, by means of its power to admit the Senators and Representatives from that State to their seats in the respective Houses of Congress; the question as to who has the duty and power to interfere in a State to guarantee the republican form must also be answered in favor of Congress, as in the case of the Reconstruction of the Southern States. Congress has also provided by law for the occasion and manner in which the President may intervene to repel invasion and suppress domestic violence upon the application of the Executive or the legislature of the State.<sup>1</sup>

**The Cabinet.**—The American Cabinet, like that of Great Britain, is not a formal legal body recognized by statute; it is a weekly gathering of the heads of the ten executive departments for report and conference with the President. The members meet in the President's office and are seated about a central table in the order in which their respective departments were created by law, and their reports are usually heard in this order unless events of special importance in one department should cause a deviation from the customary program. The Secretary of State is seated upon the

<sup>1</sup> A brief, interesting discussion of this subject is found in Chapter III of Woodburn's *The American Republic and Its Government*.

President's right, the Secretary of the Treasury upon the left of the President and so on, the order of precedence being as follows:—

State	Navy
Treasury	Interior
War	Agriculture
Justice	Commerce
Post Office	Labor

The affairs brought up for discussion are selected from the few most important matters in each department. Formal motions or resolutions are not made but a full and free expression of opinion is invited. At the close of the meeting a brief memorandum of the action agreed upon is usually communicated to the press. An interesting feature of the Cabinet is the combination of Business and Politics represented in its personnel. Our Presidents are obliged to enlist the political support of doubtful States and of doubtful factions in the party by allying the leaders with the administration. One of the best ways of doing this is by appointment to the Cabinet. But it is also necessary to have certain important departments headed by men with special administrative ability regardless of their prominence or insignificance in the party leadership. While it is conceivable that a group of capable business and professional men might administer national affairs so efficiently as to deserve general approval, the President's Cabinet must not only *deserve* but also *secure* approval; that is, some of its members must be skilled in the art of winning popular sympathy and support. The only regular organization for expressing this support is the party. In England this distinctly political phase of the Cabinet is even more pronounced than in the United States. All the leading English politicians of the majority party are necessarily made official members of "the Government." In America the President has developed the practice of securing political counsel from all sections of his party regardless of membership in the Cabinet; the latter body is gradually taking on more of an administrative character, and discusses distinctly executive rather than political questions.

Another important difference between the American and British Cabinets is the custom of American department heads of managing their departments in fact as well as in theory, while the British chiefs rely almost entirely upon their assistants for the ordinary conduct of business. This partly explains the short term of service of most American officials. Such men as have the executive capacity and willingness required to manage a department are in great demand outside the public service.

In our own country the Cabinet takes no political responsibility for the acts of the President; if a department head does well or ill the praise or blame falls on the President. If the President makes a mistake he reaps the results. Nor is there any Cabinet unity or "solidarity" as the Europeans call it, that is our Cabinet does not stand or fall together as a body,—each individual is appointed

separately and retains or leaves office as the President prefers. Since the Executive is constitutionally separate from Congress, the Cabinet does not resign when the legislative branch falls under the control of the opposition party; it need retire only when the President goes out of office. All these features of our national executive council give it a peculiar position in the government, prevent it from controlling the authority and influence which are exerted by European Cabinets, and make it chiefly a body of administrative, not political, advisers.

**The President as a Leader of Public Opinion.**—Since the President is now the chieftain of his party and has taken the responsibility for all important party measures, he must have an opinion on every national question of the day and must place this opinion before the people. The annual message no longer fulfills this function, as we have seen, and the Executive accordingly needs some more direct and frequent means of molding the views of his fellow-citizens.

The most important of these is the interview or statement given to the public journals. The Associated Press and all the larger daily newspapers of the country maintain special correspondents with offices in Washington. These press representatives are recognized and given special privileges in the Executive Office Building on the White House grounds. For many years it was customary to allow newspaper men to shift for themselves in securing information about important executive acts. If a correspondent wished to obtain news, he made inquiry of the heads of departments or secured a personal interview with the officials in question. Nowadays the old-fashioned interview with all its opportunities for misunderstanding and mistaken inferences is considered unsatisfactory and has become rare. The President frankly recognizing that the public has an interest in every important act of his administration, no longer shuns the news-gatherers, his secretary prepares full statements for the press which are sometimes read to the assembled newspaper men or are manifolded and handed to them for such use as their papers may wish to make. If public interest in the question is active, the official statements often reach a column in length and are placed on the front page of every morning paper in the country.

The influence of these written statements is general and profound. Within twenty-four hours the President by this method is enabled to place before the entire nation a concise, popular summary of his attitude, framed in his own words. It is not strange that these frequent, published addresses to the people have become one of the strongest means of molding public opinion on current issues.

A sudden emergency arises in our national policy in foreign affairs or corporate regulation, various opinions are expressed by different groups of politicians, diverse conjectures and speculations are rife as to the facts,—public opinion needs reliable, authentic

information and leadership. Immediately the newspapers of the country present on their front pages a statement from the President or a Cabinet Secretary as to the facts, the policy of the administration, and the reasons. In this way every citizen has laid on his breakfast table in the morning a communication from the chief Executive of the nation. Opinions may differ as to the advisability of his acts but the advantage is all with the President. The people feel that they are taken into his confidence and he is able to build up a strong popular support for his ideas. One result is the marked strengthening of his influence on legislation. He soon finds his efforts to secure the passage of his bills through Congress are aided by the force of the public opinion which he has himself aroused. This opinion now makes itself felt in letters to Congressmen, in letters to the public press and in the editorial attitude of the newspapers, so that on important issues it becomes difficult for the party leaders to withstand the pressure; they often fall in with the President's program because it has become the people's program.

An additional means of guiding public sentiment is the speaking tour through the country. These Presidential tours are frequently undertaken with a set purpose in view. Notable instances were President Johnson's unsuccessful "swing 'round the circle" at the time of his contest with Congress over the reconstruction policy in the Southern States. Another example is President McKinley's trip through the South in his second administration which resulted in the creation of a new feeling of sympathy and friendliness for the national Executive in that section. President Roosevelt's tour of the Central and Western States at the beginning of his second administration was aimed to secure support for his corporation policies; and his trip on the Mississippi strengthened public sentiment in favor of improving internal waterways. The speech-making trips of the President succeed or fail accordingly as he bears a clear positive message to the people or takes a merely defensive, explanatory attitude. It is not difficult for a President who has a definite program to gain strong support for it by presenting it in a popular style, free from technicalities, and taking care to concentrate public attention upon its central features only.

**The Strong President.**—A few decades ago the popular candidate for President was a man without enemies,—one who because of his diplomatic, tactful attitude towards all public questions, had avoided provoking hostility and who was therefore welcome in all factions of his party. James Bryce, in the first editions of his well-known work, *The American Commonwealth*, included a chapter with the title, "Why Strong Men Are Not Chosen Presidents." But in thirty years our conditions have greatly changed and the people no longer have an interest in the candidate who is a tactful nonentity. Rather do they favor one who proposes that something be done and who is himself a man of action. In response to this new popular feeling the political leaders in selecting their

candidates now choose men of positive force and strong views. This is not peculiar to our present conditions; in the past the national crisis has called forth the strong man. When the slavery question suddenly transformed itself into the problem of secession James Buchanan occupied the Presidential chair. Amiable, well-meaning and honest, he tried to compromise the difficulty, but in vain. The majority of the people, feeling the need of a pronounced and positive character then turned to Lincoln. Examples might be multiplied, but it is a familiar fact that the man of purpose and capacity is often forced up by the emergency. If now we add to this the fact that our present national questions are steadily growing in breadth and importance and that they can no longer be solved by the former innocuous type of statesman we may realize how completely the qualifications for the Presidency have changed and how difficult if not impossible it would be to return to the old standard.

Our view of the stronger Executive is accordingly a matter of temperament. If we believe that a passive, quiescent government is required, we shall fear the one-man power because of the danger that it may be controlled by a misguided or an unscrupulous Executive. In such a case, we say, would not the very efficiency, rapidity and irresistible power of the office become a two-edged sword which might plunge the country into war, debauch the national civil service, prostrate the business interests of the nation and even destroy popular faith in republican government? A strong Executive from this standpoint is dangerous because he is efficient for evil as well as good. But if we feel that a new era has set in in American national life and that our government must imperatively be re-enforced to cope with the greater problems of this new era, we shall be more impressed by the need for action than by the danger of mistakes, and our ideal will be an active government guided by a strong man.

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#### QUESTIONS

1. Prepare a summary of the provisions of the Constitution on the following points:

- (a) Date of Presidential election.

- (b) Presidential electors.
  - (c) How are electors chosen?
  - (d) How, where and when do electors choose the President and Vice-President?
  - (e) How, where and by whom is the vote counted?
  - (f) How many are necessary to a choice?
  - (g) How shall the President be chosen if no one secures a majority of electors?
2. Correct the following statement: The Constitution provides that the people shall elect electors who shall choose the President at Washington.
  3. Who determines whether women may vote for President?
  - 3a. Would an Act of Congress, granting to all women citizens of the U. S. over 21 years of age the right to vote be constitutional?
  4. If three candidates divide the electoral vote between them so that no one has a majority, and if the House of Representatives fails to give any of these three a majority, who would be the President and why?
  5. Which of the following men would be ineligible to the presidency and why?
    - John Doe, born in New York of English parents, October, 1877.
    - Richard Rosen, born in Sweden, 1876, of American parents, who later return to this country.
    - Wah Lee, born in 1872 in America of Chinese parents.
    - Charley Lee, born in Shanghai in 1879, whose father brings him to America in 1871.
    - Jacob Higginheimer, born in Ireland in 1874, immigrated to the United States in 1894 and naturalized in 1909.
  6. Resolved that the President should have a six-year term. Defend either side of this question.
  7. How was it intended that the President should be chosen? Did the fathers want the method to be democratic? Why?
  8. How has this method been changed by the rise of political parties? How by the Twelfth Amendment?
  9. Resolved that the President should be chosen by direct election. Defend either side of this question.
  10. Show by figures how one candidate can secure a majority of the popular vote and another a majority of the electoral vote.
  11. In such a case as the above, which candidate is the President and why?
  12. Why does not the State legislature provide by law that each candidate shall receive a number of presidential electors in the State proportionate to his share of the popular vote in the State?
  13. Contrast the salary of the President with the amount of appropriations which he actually controls for executive purposes.
  14. Can Congress increase the salary of a President whose policy it approves? Why?
  15. Can Congress diminish the other allowances of a President whose policy it disapproves? Why?
  16. What does the Constitution provide as to the President's power of appointment and how are appointments made in practice?
  17. Explain the number and importance of the positions filled by the President with the consent of the Senate.
  18. Why does the President lose so much time on appointments?
  19. Resolved that the President should be allowed to make appointments without the concurrence of the Senate. Take either side.
  20. What does the Constitution provide as to the legislative powers of the President?
  21. Did the framers of the Constitution intend the President to be the active force in law-making? Why?
  22. What influence has the annual message to Congress?
  23. The veto?
  24. How has the President secured the leadership in legislation?

25. Prove that this leadership is a temporary change due to the personality of certain Presidents, or that it is a permanent feature of our government.
26. Mention some important laws in recent administrations that were passed under presidential influence.
27. Explain the arguments used against executive influence in legislation.
28. What is the practical effect of the opposition to this influence? Why?
29. Explain how and why our foreign relations are growing in extent and importance.
30. Point out the change in our attitude toward foreign trade.
31. Cite all the clauses of the Constitution dealing with foreign relations.
32. Describe briefly the various grades of positions in the diplomatic and the consular services.
33. Explain the present method of choosing men for these services; are they permanently retained? Reasons.
34. How could the effectiveness of our foreign services be increased?
35. Why was a two-thirds majority of the Senate required for the approval of treaties?
36. How does this fit in with our present needs?
37. If a treaty negotiated by the President and passed by the Senate provides for the payment of a sum of money what further steps must be taken to render the treaty effective?
38. If a treaty and a State law conflict, which takes precedence according to the Constitution?
39. Mention some conflicts which have occurred in practice and their results.
40. Correct the following statement: The President shall have power to declare war.
41. What is the President's influence in bringing on or preventing a declaration? Examples.
42. Can the President, without consulting Congress, recognize a new nation as independent and sovereign? Reasons.
43. Can the President declare that the sovereignty of the United States extends to a given island and if he does so is his declaration binding? See *Jones v. United States*, 137 U. S. 202; 1890.
44. Mention some of the ordinary day-to-day negotiations with foreign powers.
45. Explain the need of a constructive foreign policy and some of the necessary principles of such a policy.
46. Cite the Constitution on the President's executive power and duty.
47. Why has the Executive so much freedom of discretion and judgment in enforcing the laws?
48. The tariff law of 1909 gave to the President the power of levying a maximum or minimum rate upon imports from foreign countries according to their treatment of our exports to their territory. How would you justify such a provision?
49. Why is elasticity especially needed in the executive department?
50. If the President encounters violence, in executing the tax-laws what can he do? Give examples.
51. Under the President's authority a deputy marshal is assigned to accompany and protect a United States Judge, against whose life threats have been made. In a restaurant where the two are seated an attack is about to be made upon the Judge when the deputy shoots and kills the assailant. Can the deputy be punished under State law? Why? See *In re Neagle*, 133 U. S. 1; 1890.
52. A mob obstructs the passage of a mail car. What can the Federal authorities do?
53. Cite the Constitution on the military powers of the President.
54. Why does not the President become a permanent dictator by means of these powers?
55. Why does not the annual message of the President command greater influence on legislation?
56. Explain the present usefulness of the message.



57. When the recent strike at Colorado had got beyond the control of the State government the Governor called upon the national government for protection. What clause of the Constitution justified the President's interference? Could the President under those circumstances control the Colorado militia?

58. How does the national government protect the States against violence and disorder?

59. Is the Cabinet provided for by law? What is its purpose? Explain the various elements which usually compose the Cabinet and why.

60. Mention some of the chief differences between the American and the British Cabinets.

61. Correct the following statement: The President has power to introduce in Congress bills covering the recommendations made in his annual message.

62. Why and how does the President seek to influence public opinion after he has secured office? Mention some examples.

63. Can the President pardon a highwayman who holds up a pedestrian on the streets of Chicago? Reasons.

64. U. S. Judge X is impeached and discharged from office by Congress. Can the President pardon him and restore him to the bench? Why?

65. Resolved that the welfare of the country is best served by a stronger executive department than that planned by the framers of the Constitution. Take either side.

## CHAPTER III

### THE HOUSE OF REPRESENTATIVES

**Why the House is a Popular Body.**—The American visiting the Capitol at Washington approaches the Supreme Court Chamber with reverence, he listens to the Senate debates with mingled respect and doubt, but he enters the Hall of the Representatives with the confident belief that here he will find *his* delegates expressing *his* views. "The House," as it is familiarly called, is the traditional protector and champion of the people's cause. It inherits all that popular confidence and loyalty which have accumulated through centuries of struggle in England between the House of Commons and the King and through the long colonial era in America when the people's representatives in each colony defied the royal governors. Such is the force of old traditions. But the House is also popular because it personifies all the national qualities of our people. It has its moods of exalted patriotism and of captious irritability, of noble self-sacrifice and of flippant cynicism. It can vote by acclamation in the twinkling of an eye fifty millions of dollars for national defence, or it can spend an entire afternoon on the hilarious and farcical discussion of a bill providing a whipping-post for wife-beaters in the District of Columbia. The same House which as a Committee of the Whole, threatens to plunge our civil service into the corruption of fifty years ago, by refusing to appropriate money for the expenses of the Civil Service Commission, rises from its session as a Committee and becoming once more the House proper, gravely votes to grant the appropriation which it threw out as a committee. Then too the House has the American love of extremes. It will follow its leaders sedately and decorously for half a session, then suddenly rising up for one exhilarating moment of utter defiance it can brush aside all the carefully laid plans of the leaders and send Speaker, Rules Committee, Senate and President about their business. Because it represents so many sides of American character, strong and weak, exalted and commonplace, the House has won and maintained the sympathy and confidence of the masses.

Another cause of its popular nature is the shortness of its term. As one of the Federalist writers has said, the House cannot get far away from the people in sentiment and opinions, because its term is only two years. This is a briefer term than that of any other important national legislature in the world. The British House of Commons is elected for five years but may be dissolved at any time and a new Commons may be elected in response to a change

in public opinion. The German and French lower Houses have likewise a long term, with a provision for dissolution at any moment. As between the American and English methods there can be little doubt that, practically, the latter makes the legislature correspond even more closely to the views of the people than does ours, since in America, no matter what sudden national crisis occurs, the House remains in office for its full term. Unfortunately, our House while elected in November does not go into office until the fourth of March after its election and usually does not meet until the following December, one year and one month after its election. In this period of one year new problems and public questions may arise on which the people have no opportunity to express themselves. The issues upon which the new House was elected must be decided by the old House which is still in office. There are no reasons to-day for such a long interval between the election and the meeting of the House. Its responsiveness to public opinion might be increased by an earlier opening of the session.

Another ground for the distinctly popular character of the House is its direct election by the people. The men of 1787 had little confidence in popular government. Direct election of Senate or President appeared to them to be an experiment so fraught with dangers of demagogue rule and popular turbulence as to be out of the question. The direct election of the House was however a concession to democracy which seemed reasonably safe provided it was checked by an indirect method of choice for the other departments. This popularity in the method of choice is further fortified by the provision of Section 2 of Article I, requiring that the voters shall have the same qualifications as electors of the most numerous branch of the State legislature. In Colonial times the most numerous branch of the Colonial or State legislature was the lower house and it was this lower house which had most firmly espoused the popular cause.

Finally the House is popular in a deeper sense in that it represents the people directly in proportion to their numbers while the Senate represents arbitrary State lines. The majority of the people no longer controls the majority of the Senate because the new and sparsely populated States which have been carved out of the West, taken together with certain diminutive Commonwealths in the East, possess a balance of power in the upper house. But in the House of Representatives a just rule of apportionment according to population has created a confidence that the majority of the members expresses the sentiments of a majority of the people.

**Qualifications.**—The requirements of Section 2 that every member be twenty-five years of age, seven years a citizen of the United States and an inhabitant of the State from which he is chosen, are designed to secure a reasonable maturity, Americanism and knowledge of local conditions. In practice no man is nominated as Representative by any party unless he resides in the district from which

he is to be chosen. If any party were to break this custom the opposition would have an excellent opportunity to appeal to local prejudice by nominating a man of local prominence against the outsider. There are many strong reasons for allowing any citizen who is an inhabitant of the State, to be elected from any Congressional district within the State, as is the case in Europe, but the establishment of such a practice is difficult if not impossible in America because of the political effect just described.

**Basis of Apportionment.**—The apportionment of members of the House of Representatives among the States according to the population was originally a complicated matter because of the dispute in the Constitutional Convention of 1787 between the slave and free States. The slave States wanted slaves counted as a basis of apportionment; the free States objected. The same dispute arose in relation to direct taxes, the free States wanting the slaves counted for taxation to which the slave States objected. A deadlock resulted from this inconsistent position taken on both sides, and a compromise was finally effected, by which direct taxes and representation in the lower house were coupled together, and it was agreed that for both purposes a slave should count for three-fifths of a white person, leading to the curious Clause 3 of Section 2, Article 1 that “representatives *and* direct taxes shall be apportioned, etc.” The three-fifths clause has since been repealed by the 13th Amendment, which abolishes slavery, and the 14th Amendment which provides simply that “representatives shall be apportioned among the several States according to their respective numbers.” The same section further declares that when male citizens of the United States, twenty-one years of age, are denied the right of suffrage by a State, the representation of that State shall be proportionately reduced in the House of Representatives. This latter provision, which is aimed to protect the negroes against disfranchisement, has never been enforced by Congress because of the disinclination to raise the race question and also because of the very great difficulty of ascertaining the exact number of persons who have been disqualified, and of making a proportional reduction in the representation of the State.

**Congressional Districts.**—After each decennial census Congress passes an act fixing the number of members of the next House and redistributing the Representatives among the States according to the new figures of population. It then becomes the duty of each State legislature to divide the State into Congressional districts, provided a change in the State's representation has been made. A State however may, if it chooses, elect its Representatives “at large,” that is, the State is not divided into districts but the Representatives are elected from the entire State. Each voter instead of balloting for only one Representative from his district, ballots for as many Representatives as the entire State is entitled to elect. This plan is now practiced in North and South Dakota and Wash-

ington. It is open to the objection that the minority party can elect no Representatives at all from the State, but the majority party takes all, although it may have only 51% of the total vote, while under the district plan a section of the State which favors the minority party may elect a Representative of that party. Some abuse has been made of the district method by dishonest elements in the State legislatures; in some States the legislatures have so arranged the Congressional districts as to throw into each district a majority of voters of the majority party thus giving it practically all the Representatives from the State. This is called a Gerrymander.<sup>1</sup> The fairest method would be to elect at large the Representatives from each State but to adopt some plan of minority representation in voting so that the minority party would also be represented according to its proportional strength.

**The Special Right to Propose Tax Bills.**—The Russian Douma or Lower House had been in existence just seven days when in May, 1906, it demanded complete control over the imperial finances. It is for this purpose that nations establish representative legislatures. The British House of Commons fought with the Crown for centuries to conquer and maintain this right over the purse and it was only in the measure that the Commons succeeded, that real popular government was established. It is to a dim recognition of the rights of the people to be consulted in taxation that the very existence of the British Parliament is due, and, almost without exception, the great constitutional documents of Great Britain from Magna Charta in 1215 down to the Bill of Rights of 1689, contain the solemn promises of the King to respect this right. One of the means of securing popular control is the custom of allowing only the direct representatives of the people to propose tax bills. Our American House as a lawful heir of the British Commons has inherited this privilege which is guaranteed by Section 7 of Article I.

<sup>1</sup> The best short but comprehensive description of this dishonest practice is given in Bryce, *The American Commonwealth*, Volume I, page 126, new edition:

"So called from Elbridge Gerry, a leading Democratic politician in Massachusetts (a member of the Constitutional Convention of 1787, and in 1812 elected Vice-President of the United States), who when Massachusetts was being re-districted contrived a scheme which gave one of the districts a shape like that of a lizard. Stuart, the well-known artist, entering the room of an editor who had a map of the new districts hanging on the wall over his desk observed, 'Why, this district looks like a salamander,' and put in the claws and eyes of the creature with his pencil. 'Say rather a Gerrymander,' replied the editor; and the name stuck. The aim of gerrymandering, of course, is so to lay out the one-membered districts as to secure in the greatest possible number of them a majority for the party which conducts the operation. This is done sometimes by throwing the greatest possible number of hostile voters into a district which is sufficient to turn the scale. Thus a district was carved out in Mississippi (the so-called Shoe String district) 500 miles long by forty broad, and another in Pennsylvania resembling a dumb-bell. South Carolina furnishes some beautiful recent examples. And in Missouri a district was contrived longer, if measured along its windings, than the State itself, into which as large a number as possible of the negro voters were thrown."

"All bills for raising revenue shall originate in the House of Representatives." The Senate is of course allowed to amend a tax bill, it may also introduce a bill providing for the appropriation of money. Since the Senate amendment may and often does take the form of a completely new substitute for the House bill the ancient privilege of the lower house amounts to nothing in practice. The real advantage is with the Senate as we shall see.

**Impeachment.**—A second special prerogative of the House is the power of impeachment. Section 2 of Article I provides "The House of Representatives shall choose their Speaker and other officers and shall have the sole power of impeachment." By impeachment is not meant the hearing and final decision of the case (this duty belongs to the Senate which is the trial court), but rather the bringing of a formal accusation. This accusation, which is technically the impeachment, is formulated by the House. After the resolution of impeachment has been passed, a special committee of the House is then chosen to present the charge to the Senate and to conduct the prosecution before the latter body. In the final trial before the Senate a majority of two-thirds of the Senators present is necessary for a conviction but in the House the vote to bring the accusation or impeachment may be a simple majority. The most noted trial in America, that of President Andrew Johnson, resulted in a failure by one vote to secure the necessary two-thirds majority in the Senate. President Johnson's differences with Congress were mere differences of opinion on questions of reconstruction policy, in which it now seems he was right, whereas the process of impeachment was intended as a punishment for flagrant wrongdoing. The influence of partisan or factional intrigue in the determination of a case was not foreseen by the framers of the Constitution. Impeachment is no longer considered a feasible means of remedying any evils short of treasonable misconduct.

**The Speaker.**—When the authors of the Constitution provided that "The House of Representatives shall choose their Speaker and other officers" they had in mind a Speaker who would act merely as a chairman in debate, presiding over the proceedings with that impartiality which is customary in all foreign legislatures, especially in Europe. But the keen conflict of parties in the United States and the many opportunities that are presented to the minority party to obstruct business by taking unfair advantage of the rules, have placed the Speaker in an awkward predicament. Either he must stand by and see the measures to which his party stands pledged, blocked by the obstructive strategems of the minority or he must plunge into the conflict and use his official power to aid his party in the passage of those measures. He has chosen the latter course. Whether the Speaker has been Clark, Crisp or Randall of the Democrats, or Cannon or Reed of the Republicans, he has been forced to abandon all pretence of impartiality and to support and guide his party in its legislative program. Previous to 1910, the

Speaker was the autocrat of the House. He appointed committees and their chairmen, he dominated the all-powerful Committee of Rules which determined the order of business of the House, and, by his influence over the committee chairmen, he determined what action should be taken by each committee on every important bill referred to it. As his prestige grew, the competition among the members of the House for his personal favor also increased; it was in the Speaker's power to consign a member to oblivion or to exalt him to the chairmanship of a strategic committee upon whose work the attention of the nation would be concentrated. The McKinley Bill, as the tariff of 1890 was called, gave an international reputation to the Congressman from Ohio and placed his foot on the steps of the White House. Yet he was simply the chairman of the Committee on Ways and Means and as such had done what the heads of other committees do. All the Republican members of the committee took an active part in the preparation of the measure and it cannot be said that McKinley more than others actually framed the bill. But as chairman he was necessarily chosen to introduce and press the new measure to successful passage. So also the Wilson Bill, as the Democratic tariff law of 1894 is called, the Dingley Bill, or tariff of 1897, the Payne bill, the Hepburn bill, etc., have all been represented by chairmen or members of important committees,—men whose appointment to such committees placed them in the forefront of legislative activity and public discussion.<sup>1</sup> It was therefore natural that this control over the personal destinies of members of the House should make the Speaker not only the moderator but also in a real sense the dictator of the House.

The Speaker became the maker of both laws and men. He determined who should stand in the public mind to represent and personify the principles of the majority party, whose names should be on every lip in political discussions, whose speeches should be printed in the newspapers and who should lead the party on the great issues of the day. As ex-officio member of the Committee on Rules, the Speaker determined what measures the House should consider and for how long. Armed with this power, it was inevitable that he must sooner or later confuse his personal views with the will of the majority party and that when these two conflicted, he should be in position to use every means in the control of his office to suppress opposition.

It was this personal use of the Speaker's power which led in 1910 to an insurrection within the Republican party. The insurgent element declared for greater democracy, for more frequent consultation of the party members on questions of policy and the total and complete abolition of the Speaker's practice of punishing men who

<sup>1</sup> The Underwood tariff shows the difference wrought by the new rules of 1910 and later years,—Underwood was a prominent leader long before he was made chairman of Ways and Means and he does not owe his position on the committee to the Speaker but rather to election by his colleagues.

opposed him in the party counsels. They declared that no party member who merely differed from the Speaker on questions of policy was therefore to be excluded from the important committee appointments and otherwise punished in the procedure of the House. Such had, unfortunately, been the policy in certain notable cases.

A remarkable instance was offered in the 1st session of the 59th Congress. At that time a bill for the restriction of immigration had been passed by the Senate in response to a strong public demand. The bill imposed a tax on all immigrants, and required an educational test. The member who had framed it, a representative from Massachusetts, had made repeated attempts to have the measure considered by the House, but was unable to secure the Speaker's consent so long as the educational test was included in the bill. The member in question, knowing that a majority in the House wanted to enact the bill in deference to public opinion, was therefore confronted by the evident alternative of dropping an essential part of the measure or attempting to pass it against the Speaker's wishes, thereby incurring his wrath. It was precisely this danger of losing all independence and initiative or suffering the Speaker's possible persecution, which afterward led the members of the House to revolt against his authority and limit his powers. In our illustration, the member decided to push the bill through. He thereupon issued a call for a caucus of the majority party, which call was signed by the requisite number of names to make it valid.<sup>1</sup> The effect of such a caucus would be the adoption of the bill as a party measure, which would bind all members of the party, including the Speaker, to support it. The Speaker, knowing this, immediately changed his attitude and professed to be ready to support the bill. The caucus was abandoned as unnecessary.

When, however, the bill came up in the House, both in the Committee of the Whole and on the final vote in the House itself, the Speaker used his utmost influence to amend the bill by striking out the educational test. He urged, entreated and threatened members, finally securing a majority in favor of the amendment, thereby emasculating the bill and defeating one of its chief purposes. The next step was the punishment of the framer of the bill for attempting to push it through the House in its original form, against the wishes of the Speaker. This was easy. The bill had to be referred to a Conference Committee representing both Houses in order to put it in final shape for passage. The framer of a bill is invariably made one of the House members of a conference committee. The Speaker refused to do so in this case, thereby excluding the author of the bill from all participation in the final decision as to its form. This member had concentrated his entire activity during the session upon the preparation and passage of this one measure. Yet, at

<sup>1</sup> If 50 members of the party ask for a party caucus, such a meeting must be held under the party rules.



the close of the session, he was sidetracked and his measure handed over to the tender mercies of its enemies. This incident illustrates the overwhelming power of the Speaker and his lieutenants under the former system. It further shows that they were not only able to control a vote in the House, to punish members who refused to "go along" but even possessed the power to defeat a measure which public opinion endorsed. Such a display of irresponsible power could not long continue in effect. It was the high watermark of the Speaker's authority.

It is probable that the Speaker might have retained his powers had he refrained from such attempts to punish and suppress committeemen who failed to do his bidding, but the setting up of a personal machine within the House and the excommunication of those who disobeyed only served to strengthen the demand for a reorganization. The insurgents claimed that in order to protect the members of the party and insure the carrying out of its will the Committee on Rules should not be under the control of the Speaker, nor should he be a member of it but that it should be elected by the members of the House. Against these demands Speaker Cannon marshalled his committee chairmen, floor leaders and all the stalwarts of the majority and sought to crush out the opposition within his party by the old-time methods; but the insurgents were not to be beaten by this display of force. They formed an alliance with the Democrats and securing a majority in this way, amended the rules in the above sense. The committee on rules was enlarged from five to ten members, elected by the House and the Speaker was deprived of his membership in the committee. In the following session of Congress the Democrats were in the majority and the first question which claimed their attention was the revision of the Speaker's power. Having steadfastly declared for a more democratic form of organization, they proceeded to reorganize the entire committee system and the House rules.

**Selection of Committees.**—The first step was to provide that all standing committees, which are the important ones, must be elected by the House. This at one stroke removed from the Speaker his most extensive and most dreaded power. In practice, the committees are now chosen as follows: The majority party holds a caucus at which it elects by ballot a party committee on committees. This body is composed of the party leaders and its duty is to distribute committee memberships among the different members of the party. Each member is placed according to his importance, experience and ability, but not according to his mere docility or compliance with the wishes of the Speaker. The committee on committees, having completed its labors and arranged its lists, a formal meeting of the entire House is called, at which the various members are nominated for the committees to which they have been assigned, and are formally elected to the same. With slight variations, the same procedure is followed by the minority party

which has meanwhile had assigned to it a certain number of places on each committee. These places are distributed by the caucus of the minority party by its executive committee. Its committee members are nominated in the House election and formally chosen at the same time as the majority members, the floor leader of each party making the nominations. We must not suppose that this new plan of electing committee members thereby removes them entirely from the control of the party leaders. Such a system is unthinkable because with it the discipline of each party would disappear. On the contrary, the new system simply transfers party control over the members from its arbitrary, intensely concentrated form in the Speaker's hands to the hands of the committee on committees, which is a gathering of all the party leaders of the majority. While this may not appear to be an important change in theory it is in practice. All the members of the House would prefer to have their committee appointments, and thereby also their opportunities for legislative work decided by a gathering of the leaders than by a single individual. It is this change from a monarchy to a representative system in the control of procedure which makes the new plan more welcome to the members, and on the whole more successful in the operation of the House.

**Present Powers.**—In spite of this curtailment of his prerogatives, the Speaker still wields the strongest influence in legislation. He presides over the proceedings of the House, refers bills to Committees, and in general is the leader of his party in the House. In presiding over debates, he recognizes whom he will. Theoretically, the first member who rises and addresses "Mr. Speaker"—has the floor, but in practice such an informal method of securing the ear of the House is most rare and can occur only in unimportant debates. The speaker now either has at his elbow a memorandum of the men whom he is to recognize and give the floor, or he has already arranged with the floor leaders of the respective parties that they are to divide the time for debate among their followers. In a general, promiscuous debate the Speaker can and does select those men for recognition, who will voice the sentiments which he wishes to have expressed. Therefore as the arbiter or pilot of debate the Speaker can not only protect his own party from defeat and delay, but within his party he can strengthen and develop that group of men which he favors. As presiding officer, he decides points of order and procedure, always with a view to the promotion of his party's legislative program.

**Committee on Rules.**—This body is at present composed of ten members, elected, four by the minority and six by the majority. The work of the committee is to prepare a set of rules of procedure for adoption by the House and to bring in from time to time special rules determining what measure the House shall consider. The procedure rules have grown up through a century and a quarter of congressional practice and are therefore little changed from term

to term, even when the majority passes from one party to another. They cover about one hundred and fifty pages, including Jefferson's Manual, and are renewed by motion at each Congress. But the most important power of the committee is its right to bring in a single rule at any moment. The committee's report is in order at any time, and takes precedence of all other business. It is also the rule that the report when made must be acted on immediately by the House, usually with an extremely limited time for debate,—often not more than ten minutes on each side. In order to appreciate the practical value of the committee's work, let us take the House for example at a time when the two parties are nearly equal in numbers. The minority, feeling its strength, is making every effort to prolong debate and to harass and delay action. The majority, feeling its control over legislation slipping from its hands, is beginning to grow restive under the strain. In such a case, heroic measures are needed. The majority leaders, who are nearly all members of the committee on rules, confer with the Speaker and agree on a rule which shall confine the House to the consideration of a particular measure, and shall insure an early vote. They prepare a rule accordingly, providing that on a given day the House shall proceed to the consideration of House Bill No. 362 and shall continue such consideration from day to day. This means that House Bill No. 362 is to be taken from its place far down in the calendar and given preference over all other measures until passed. The majority members of the committee, having agreed, the minority members are then notified and the committee of rules reports its rule to the House for approval. The House must then decide at once to accept or reject the rule. It necessarily adopts the rule, because a rejection would mean the repudiation of the majority party leaders, something which rarely occurs for obvious reasons. The change made by the Democrats and Insurgent Republicans in the committee on rules has not diminished the powers of that body, but has distributed these powers among the leaders of the majority party instead of concentrating them in the hands of the Speaker as was formerly the case.

**Floor Leaders.**—The position of floor leader is highly important but is little understood by the public. Briefly summarized the duties of the leader are to direct and manage, for his party, the debates on important measures. Congressional debates involve numberless questions of parliamentary law and legislative procedure which are of so complicated and delicate a nature as to endanger the passage of any measure which is not guided by skilled parliamentarians. The first function of the floor leader therefore is to avoid the pitfalls by which the opposition party may attempt to defeat a bill and the embarrassments into which its own advocates through carelessness may bring it. Furthermore the conduct of a debate involves far more than a series of speeches on each side; if the bill is one of importance, to which the party stands pledged,

the bill must be put in the most acceptable form, it must be advocated before the House by the strongest speakers, and these speakers must bring out the best features of the bill; this must all be done within a limited time and in such a tactful way as to keep the rank and file of the majority members enlisted in support of the measure. This is the second function of the floor leader,—to marshal the forces of his party so as to present the most effective array in debate and maintain carefully the party strength and support. This second power leads to some curious results in practice. Let us take the final debate on an important bill in the House. The majority floor leader confers with the minority leader and a verbal agreement fixing the day and hour for the final vote is reached. This the majority leader can easily secure because he is supported by the Committee on Rules which if necessary can report a special order fixing a time for the vote. The agreement frequently provides that one hour for debate shall be given to each side before the final vote is taken. The floor leader of each party then arranges the list of speakers for his side. Strange as it may seem a Representative who wants to address the House is in this way often obliged to report to his floor leader and have his name placed on the list of party speakers by the leader, otherwise he has as little chance of securing the floor as has a spectator in the gallery. It will be noticed that such an arrangement gives the right of debate, not to members of the House, but to the party organizations in the House, and within these party organizations, it recognizes the leaders only. The severity of this rule varies according to the importance of the bill under consideration and to the amount of free time which the House has at its disposal. Occasionally on a minor bill, or in the early days of a session when there is no business of importance pending, the floor may be open to all members of the House and the pent-up stream of oratory may be allowed to flow for two or three days. Paradoxical as it seems, the Representatives are only able to express themselves fully on unimportant measures or those in which the people have little or no interest;—on essential bills, only from one to five minutes can be allowed to each member on the floor of the House. The leader may conduct his debate in either of two ways: he makes up a list of his party colleagues who wish to speak and who have handed their names to him for that purpose, which list he then delivers at the Speaker's desk, thereby fixing the order in which the members of his party shall take the floor; or more usually he claims for himself all the time allotted to his party, and after having made some preliminary remarks, he yields the floor for a fixed time to each one of his party colleagues whose names are on his list. At the end of each of these speeches, he states, "I now yield the floor for — minutes to my colleague from —." The gentleman from — speaks for the allotted period, and so on down the list. When the list is exhausted, the floor leader then arises and concludes his own

remarks, summing up the arguments of the preceding speakers and re-enforcing them with others of his own. He speaks authoritatively as a representative of his party and closes its side of the debate. In this way he controls the discussion at all times. In many cases where the time allowed is extremely limited and only one hour can be given to each party, the share which an individual member may receive from his floor leader is exactly one minute and even then a number of members must be denied a hearing. Because of the importance of expert management of debates, the position of majority floor leader is the most responsible post in the House next to that of the Speaker; for this reason also it is necessary that he should be posted on all points which may be brought up in connection with the pending debate, and if the official leader is not so prepared it is customary to make the chairman of the committee which has reported the bill, the floor leader for that particular bill, thereby bringing to the front for the majority party the strongest representative in its membership.

**Choice of the Floor Leaders.**—Although the floor leaders are men of great influence and authority, they are not irresponsible despots,—usually they are prospective candidates for the position of Speaker in some future Congress; a fact which makes them solicitous to win as large a personal following as possible and renders them amenable to any strong and continuous drift of opinion among the House membership. Then too, they must be leaders in the real sense of the word; that is, they must be able to control and influence the votes of their fellow members. They are chosen by the caucus of their party.

The minority party also holds a caucus and nominates a candidate for speaker, who is foredoomed to defeat at the subsequent election of the House but who becomes the leader of the minority, is so recognized in debates, by the Speaker of the House, and is given charge of the floor for the minority party. He is also elected on the important committees. In this way he becomes almost as absolute in his sway over the minority party as are the Speaker and his floor leaders over the majority party. In both parties discipline and "organization" are the controlling influences.

For many years the Republicans excelled in superior organization and the party's control over its members and its practical results in legislation were at times astonishing. The Democrats on the other hand, having no one great issue on which they could unite all their forces, tended to dissolve into a series of small groups and factions, and thereby lost completely the cohesive unity which the minority party must have in order to be effective. Lacking this spirit of "team-work," they were unable to present a united front to the country and lost many opportunities to take advantage of the mistakes of the majority. The results of many national elections may be fairly ascribed to this inefficient organization of the Democrats; but with the gradual rise to influence of Mr. John

Sharp Williams, Mr. Champ Clark and Mr. Oscar Underwood, the control of the party passed on into the hands of men of larger caliber with a stronger grasp of the possibilities of party organization. These three men, and more recently the latter two, have worked assiduously to weld together the discordant elements in the Democratic minority, and when the party obtained a majority in 1910 they successfully coped with the even more difficult task of reorganizing the House committees, revising the powers of the Speaker, and developing a positive constructive program of legislation, meanwhile holding the various recalcitrant groups in the party to a strict observance of party discipline. This remarkable change, which has been aided by the firmness and authority of the President, unquestionably marks an era in the history of our American parties and is all the more remarkable in that during the same period the elements of dissension crept into the Republican party and impaired its popularity at least for a time.

**The Caucus.**—Frequent reference has been made to the caucus; this is a secret conference of members of a party for the purpose of securing unanimous party action on some important question. Such a question may be the nomination of a Speaker, the decision as to how the party should vote on an important bill or resolution, or the general attitude to be taken by members of the party on some new problem which, it is foreseen, may arise during the session. The main idea on which the caucus is founded is quite simple. Each party knows that if it presents an unbroken front it not only stands a better chance of dictating to or securing concessions from the other side, but it also commands more substantial support and respect from the people. In the seven years from 1895 to 1903 an internal dispute or schism in the Democratic minority destroyed its ability to caucus in either House or Senate; as a consequence the party fell rapidly to such a position of weakness and helplessness that it lost all control over its own members and became a negligible quantity in national legislation. Meanwhile, the majority by its strict enforcement of caucus rules was enabled to run the government as it pleased. When in 1910 the Democrats secured a majority in the House they became a constructive party and were obliged to make frequent use of the caucus, aided by the President's active influence. The caucus is the simplest means of preserving party unanimity and discipline in favor of a positive program of legislation. A new bill comes before the House in the early part of a session and before the discussion progresses to any length it becomes apparent that large numbers of the people are interested in the measure and desire either its passage or its defeat or amendment. If the individual members of the majority party are left to themselves some will advocate it, some oppose and some insist on essential changes in the bill, and since the weight of inertia is against legislation, the bill must apparently fail for want of agreement. At this point the caucus machinery of each party is set in

motion. The majority meets and perhaps decides that the bill should be made a party measure. This means that every member who attended the caucus must vote for the bill on its passage through the House. He may express what views he pleases in the caucus, he may use all his influence against the measure within the conference room but once the caucus has acted, he must support the common policy by his vote in the House. "Must" means that if he refuses he is outlawed from his party, the measures in which he is interested are marked for an early grave, he may be denounced to the party executive committee in his State to be defeated in the next election and his usefulness to his constituents as a legislator is at an end until he repents, is forgiven and becomes once more an obedient member of the caucus. Severe as is this discipline it is impossible to see how a party could otherwise secure the passage of legislation for which the country holds it responsible.

Meanwhile the minority party may also hold its caucus and decide on an equally binding policy for its members. Formerly the minority would simply oppose the measure, but since the essential differences in principle between the parties have disappeared and they are now competing with each other on the same ground, the minority is apt to advocate either a more radical or a more conservative substitute for the measure endorsed by its rival.

From this description it will be clear that the caucus is another influence towards the weakening of the individual member for the benefit of the party. It also strengthens greatly the position of the party leaders. By securing the adoption of a bill as a caucus measure they can crush out all effective opposition among the rank and file of the House membership. But we must also remember that it enables a scant majority of the majority to control the action of the entire House, although forming but a fraction of its membership. Many observers have seen in this practice a serious danger to our institutions and have pointed out that a clique of interests may dictate the legislation of the country on important questions. Doubtless the danger is a real one. But it must be understood that strong influences tend to correct any serious abuse of caucus rule. First, the caucus of the minority party itself which is eager to see and advertise the slightest mistake of its opponents and, by shrewdly taking a pronounced and public stand in opposition, to bring out sharply the contrast between the two parties in the popular mind and thereby win public support. Second, caucus action does not bind individual members except upon measures of serious importance to the party, that is, unless a majority of the party members in the House should declare the matter a party measure. This cannot be done with any bill at the mere whim of the party leaders. In order to outlaw a member who refuses to abide by caucus action the leaders must have the aid of public opinion within the party and if the impression got abroad that the caucus was being improperly used to push through bills of no essential interest

to the party an immediate rebellion might be the outcome, with disagreeable results for the leaders. Since 1908 the spirit of independence has become so strong that political ties are no longer all-powerful and the members have grown more keenly sensitive to expressions of opinion among their constituencies.

Third and most important is the good sense, practical experience and sound judgment of the leaders themselves. They must know when to insist and when to forbear, when to give free sway to individual views and when to concentrate the entire strength of the party upon a single important measure to insure its adoption. The House may lose its head often, but the leader must never do so. It is this steadiness and breadth of view which offers the chief protection against abuses of the caucus system and of the party discipline.<sup>1</sup> Those who criticize so harshly the emphasis placed on party organization and the practical elimination of the individual at times, must remember that the House has reached an almost unmanageable size and that although it cannot deliberate with 435 members, yet it must enact into law the principles to which the majority party is pledged. It is admitted that in so doing the free prerogatives and privileges of individual members are often limited to an undesirable, almost intolerable extent but this is necessary if the lower house is to be an acting rather than a mere debating body. The mass of bills and resolutions is so great that complete freedom of debate would be impossible and would block action on necessary measures, thereby placing the majority party at the mercy of the minority.

Such are the arguments for and against the present method of controlling the House debates. Weighing each carefully it appears that there have been good reasons for the development of the sys-

<sup>1</sup> In 1913 the caucus of both the Republican and the Progressive parties in the House was thrown open to the public as a permanent policy, the party members retaining the right to hold a special secret caucus when desired by the majority of the members. The Democratic caucus is still held in secret.

Following up the movement for a more representative organization of committees and procedure, the Democratic party now elects in a caucus not only its candidate for the Speakership but also the floor leader of the party and the party's members of the committee on Ways and Means. The members of Ways and Means form what is in reality a "steering committee" for the party, and at the same time a committee on committees; they assign all the members of the party to the various committees and thereby make the choice formerly belonging to the speaker. The party has also agreed that each member of the eleven big committees, such as Ways and Means, Appropriations, Agriculture, Post Offices, Rivers and Harbors, etc., shall be allowed to serve on only one such committee. This opens up the memberships in the more important bodies to a larger group of men and prevents a small clique from monopolizing all the desirable posts. In 1913 the Senate Democrats agreed to change the autocratic power of the committee chairmen in that body. The new rules authorize a majority of the party members in a committee to call a meeting of the body to appoint all conferees and to name sub-committees,—all of these were former prerogatives of the committee chairman. *The steering committee of the party in the Senate is no longer to be appointed by the chairman of the party caucus but to be elected by the caucus itself as in the House.*



tem but there is no ground for the maintenance of a personal or irresponsible "machine" or clique such as existed under the old regime. When the majority party is to be defended from the obstructive tactics of the minority all will agree that the leaders' authority must be extended to force legislation through; but this authority must not be employed to defeat or impair measures upon which the party is substantially agreed, nor must it become a means of punishing or rewarding the personal friends and enemies of the ruling clique, otherwise representative government ceases. The present organization of the House, the method of choosing the floor leader, committee on committees and the party's representatives on the committee on rules seems far more equitable and fairer than the old dictatorship, while still allowing effective concentration of authority in battles with the obstructive minority.

It seems only a question of time until the same movement which has led to the reduction in size of city councils and is now centering around State legislatures, shall also reach the national House of Representatives and cause a change in our present methods of distributing members among the States. Most of the drastic measures which are necessary to secure the transaction of business in the House and the sacrifice of the new member for the sake of getting bills passed and business transacted might be dispensed with or modified if the House were a body of reasonable size. We may never adopt the commission form of government for the national legislature but we might unquestionably improve our procedure and the quality of our legislation greatly by making debate possible in the House. With a minimum number of one from each State and slightly more from the larger States, the House could be cut down to a body of 100, a change that would restore to it much of its former importance and prestige.

**Committees.**—Dr. McConachie in his interesting work on *Congressional Committees* has pointed out that the history of a nation is mirrored in its legislative committees. As new questions of public moment arise, new committees are formed to deal with bills on the subject, as old problems are settled and pass out of the political horizon, their corresponding committees diminish in importance and are discontinued.<sup>1</sup> The acquisition of our island dependencies

<sup>1</sup>"Society is everywhere using committees. Their importance in the many lines of public and private co-operation is on the increase. Here a fashionable city club chooses certain of its members to arrange for some brilliant reception; there a busy board of trade requires a select few of its body to report upon an important commercial undertaking. The Christian Endeavorers find remarkable utility in the committee idea. So does Tammany Hall. Alike to the primary and to the governing council in a rural American village, to the German Reichstag and to the active municipality of Berlin, the device is indispensable. . . .

"Wherever men have begun to use political representation, advantages similar to those which recommended it to democracy have soon led the assembled representatives a logical step farther to commitment. . . .

"The waxing and the waning of committees and their struggles among them-

in the Philippines, Porto Rico, Guam, etc., gives rise to the new Committee on Insular Affairs, the demand for more land in the West develops a need for irrigation on a large scale and this in turn causes the establishment of the Committee on Irrigation and the passage of laws which have done more for the West than any measures since the building of the trans-continental railways. Meanwhile, the Pacific Railway question having been solved, there now remains nothing to prevent the Committee on Pacific Railways from disappearing altogether.

There are certain committees which, owing to the peculiar nature of the matters under their control, have achieved positions of special distinction and importance. A description is given of a few of these in order to show the practical working of the Committee system.

**The Committee of the whole House** on the State of the Union is composed of all the members of the House; it is presided over not by the Speaker but by some member whom the Speaker designates for the purpose. Its rules of procedure, unlike those of the House, are very informal, yea and nay votes of individual members are not recorded because the proceedings are only those of a Committee. All the action taken by the Committee is on the same plane as the action of any other Committee, that is, to be valid it must be approved by the House sitting formally as a House. The purpose of the Committee is in general to allow of free discussion and amendment of a measure so as to mold it into the most favorable form for presentation to the House. This by no means precludes further amendment after the bill is reported to the House itself, but is designed to secure the adoption of the best amendments under the most favorable auspices. The manager of the

selfes reflect the changes which are going on in national life. From their composition one knows whether the Philistines of Silver or the Israelites of Gold prevail in the American Canaan. The glory of certain of them is but for the passing hour; the importance of others is constant, because from the nature of the subjects confided to them their duties are continuous and unvarying. When the nation is fighting, the War and Naval Committees and the Ways and Means are a ruling triumvirate; in peace these become pack-horses for public improvement committees and Appropriations. If Captain Grant is hauling cordwood into St. Louis or buying hides in Galena, the Military Affairs at Washington is leaning back in its chairs with hands in pockets, to what heights will not Appomattox see both captain and committeemen advanced!

"Members have become prominent in the House, who, fathoming the currents of public interests, have sought through the Speaker membership upon committees to which issues of coming importance are to be intrusted. Thus did Stephen A. Douglas seek membership on the Committee on Territories in the Kansas-Nebraska Question; thus did James A. Garfield gain increased distinction in turning at the close of the Civil War from Military Affairs to Ways and Means. One of the older committees has stood throughout the century without undergoing the expansion which has come, for instance, to the Elections and the Claims; if changes of long-standing policy involve the United States in the intricacies of world-wide politics, this Committee on Foreign Affairs may in the whirl of increasing business also be found to throw off the planets of a new group."

bill or the floor leader of the majority usually makes the motion to go into the Committee, as follows, "I move that the House resolve itself into Committee of the Whole for the consideration of House bill number — under the five minute rule." The motion being carried the Speaker designates a chairman and usually retires. Each member is then allowed to speak once for five minutes upon each motion before the Committee. As there may be many amendments and motions made this amounts practically to a full and informal discussion of any point in the bill. After all the proposed changes in the bill have been acted on the manager moves that the Committee "rise and report to the House" whereupon the chairman reports, to the Speaker, the bill in its new form. The House as a House may then accept or reject the action taken by the Committee of the Whole, in fact it frequently happens that important amendments or modifications of the Committee's action are made at this time. The fact that any action taken by the House formally is recorded on the Journal with the names of those voting yea or nay has an important influence in inducing some members to vote one way in the Committee but a different way in the House when their votes must be recorded for public information and telegraphed over the country by the public press. The Committee of the Whole House like so many of our Committees is taken from the practice of the British House of Commons, where it has been in use for centuries.

The Committee of Ways and Means is composed of eighteen members; like all legislative committees its membership is divided among Republicans and Democrats approximately in the same proportion in which the parties are represented in the House. The Committee considers all proposed legislation on the raising of revenue by taxation or otherwise and the bonded debt of the United States. Since as we have already seen, the earliest history of the British Parliament shows it to have been an attempt by the people to secure some control over the public taxation, the Committee on Ways and Means (of securing revenue) in any representative government is apt to be the most important. In the United States there is an additional reason for its importance. The manufacturing interests of the country have secured the adoption and maintenance of a protective tariff system which forms a subject of constant discussion. From the passage of the first customs tax-law at the outset of our history down to the present day this discussion has raged with increasing vigor. Therefore the Committee of Ways and Means, established in 1802, has been the storm center of the tariff agitation. Next to the Speakership no position is so much sought as the Chairmanship or a membership in this Committee. As its organization and methods of procedure are largely typical of all other committees, it deserves a careful examination. The Chairman is usually a man of great prominence in the party. His views on the all-important question of the tariff must be

“sound” and orthodox, that is, if a Republican he must favor a high tariff, if a Democrat he must advocate a low tax. It goes without saying that he must also be persona grata with the leaders, otherwise he can expect no chairmanship. If he conforms to these two requirements and is at the same time a man of considerable ability, his prospects of promotion are indeed most brilliant, for he stands before the people of the United States as a personal representative of a fundamental issue in American politics.

The Chairman appoints a paid clerk and assistant clerk with the approval of the committee; when a new tariff bill is to be submitted to Congress he draws up a general plan apportioning the tariff schedules on different classes of imports among the different members of the majority party in the committee. These members draft a preliminary scale of rates for their respective classes of goods and the whole majority membership is then called together during the Summer months and a detailed draft is then made up and completed. When Congress meets in December each division or schedule is then called to the attention of manufacturers and others interested and the “committee hearings” are begun. These committee hearings are formal meetings at which representatives of any view may appear and present their testimony before the committee. Such hearings give the committee an opportunity of learning at first hand the precise opinions and wishes of the interests directly concerned; it has even been customary for such interests at times to employ legal talent for the effective presentation of their cases. But in all candor it must be said that the meetings serve primarily a different purpose. They create in the mind of each set of interests the impression that their side has at least been given a fair hearing. As for the influence of the hearings upon the committee itself, this is in most cases very slight. The draft of the bill is fairly well completed before Congress meets and while any committee may with the consent of Congress meet during vacation period and take evidence, such a procedure is not common. The hearings therefore come up after the decision of the majority members of the committee has been made.

After the hearings the committee reports the bill back to the House with a favorable recommendation.

In this brief description of the genesis of a tariff bill certain important points should be noted.

1. Bills originate with Committees. Any individual may introduce a bill or resolution; over 30,000 of them are recklessly poured into the House during a single term, but those measures which receive the serious attention and time of the House are prepared by Committees.

2. The majority members of the Committee prepare a draft of all important bills far in advance of the meeting of Congress.

3. Open hearings are held in order to give all sides an opportunity to present views.

4. The Committee reports favorably on the bill. There may also be a report by the minority members, of an unfavorable tenor, but this is ignored by the House.

**The Committee on Appropriations**, consisting of seventeen members, was established in 1865. Its jurisdiction includes all general appropriations for the support of the government, for the District of Columbia and appropriations to cover deficiencies. Certain special affairs and departments with their appropriations are under the care of other Special Committees, e. g., Military Affairs, Naval Affairs, Post Office, Rivers and Harbors.

Membership on the Committee on Appropriations is of great importance because of the control and influence over the executive branch of the government and over the general disposition of the public funds. The Ways and Means Committee touches closely the industrial system of the country through its control of the tariff but a membership on Appropriations gives a Representative the enviable position of a dispenser of moneys. To this Committee a number of important branches of the executive departments must come for their funds, and all extra expenditures must be explained and justified. Its membership therefore confers a peculiar influence and power and often leads to higher preferment. It therefore ranks third in importance and influence among the House committees.

**The Committee on Rivers and Harbors**, for reasons similar to those already given, offers a highly desirable opening to ambitious members. Although it is a comparatively young body, having been established in 1883, its jurisdiction over the improvement of rivers and harbors gives into its control the commercial development of nearly every important city in the United States. There are few large municipalities in the country which are not located on some body of water. To keep the water approaches navigable involves a great expense in dredging, construction of jetties, breakwaters, etc. In the competition between different localities to secure a proper proportion of trade by land and water, the failure to keep the harbor in the best possible state of improvement may mean to a city the permanent loss of its trade. The struggle to secure a Congressional appropriation for harbor improvements is in fact a struggle for existence. The decision as to which localities shall be given this much coveted and needful aid rests with the Committee. There is another important aspect of the Committee's powers. In the language of party politics the States of the Union are classified as "solid" or "doubtful." It is the policy of the majority party to treat the doubtful States with such careful tact and consideration that they will be led to recognize the practical advantages of supporting the party in power. There are several means of building up the party influence in doubtful States, one is by appointments in the Federal service, another by Federal appropriations benefiting the various districts of the State. In this

latter part of the plan the improvement of rivers and harbors forms the most important feature for the reasons already given. It is an essential link in the chain which holds together the party organization in doubtful sections. The disadvantages of the plan are obvious, in that the "solid" States are apt to have their interests woefully neglected. It would seem that the "stalwart" commonwealths in both parties pay a disproportionately high price in loyalty and in other respects for the actual benefits which they derive from party allegiance, while the doubtful States, courted by both sides, are given all the choicest advantages which the resources of the government can place at their disposal. On the other hand so long as our government is run by parties it is difficult to see how the party managers can be expected to abandon the policy of strengthening and expanding the party's influence in doubtful territory. The remedy lies largely with the "solid" States. They should insist upon a more reasonable and equitable distribution of government improvements. Signs of such a change of attitude are already visible. The essential point is that in all the interplay of interests and influences between different sections of the country, between parties, and between different factions within a party, the decisive victory is usually won in the deliberations of some Committee. Because of its control over the commercial and political destinies of the great urban districts of the country, the Rivers and Harbors Committee is rightly regarded as one of the highest and most influential assignments in the House.

**The Committee on Interstate and Foreign Commerce**, established in 1891 to take the place of the old Committee on Commerce created in 1795, has jurisdiction over the most important problem now confronting the national government,—the adequate regulation of railway, steamship, telegraph and express companies, oil pipelines, etc. Commerce between the States and with foreign countries is under the jurisdiction of the national government. Since the formation of the great industrial and commercial combinations it has been a matter of complaint by the smaller producers that the combinations have received special favors from the railways, while the smaller shippers have been discriminated against. Other serious evils have arisen in the transportation systems of the country until the general impression grew up in the public mind that the national government must intervene more actively to insure fair treatment for all. Great waves of public feeling have at various times swept over the country and in response to these, laws have been enacted designed to allay public indignation. Such has been the work of the House Committee on Interstate Commerce. Its economic importance is second only to that of the Committee on Ways and Means.

In addition to these committees which may be called the cream of the House organization there are a number of other standing committees such as:

Foreign Affairs	Coinage
Military Affairs	Elections (3 divisions)
Banking and Currency	Insular Affairs
Post Office and Post Roads	Irrigation
Immigration	Naval Affairs
Judiciary	Patents
Agriculture	Public Lands
Claims	Territories, etc.

**Committee on Contested Elections.**—Until very recent years, the bitterness of partisan feeling and animosity has led to a large number of contested elections at each Congress. These contests involve charges of fraud and corruption or of inaccuracies in counting the vote. In order to prevent a great sacrifice of the time of the House upon such contests, it has been customary to refer all of them to three standing committees on contested elections, the House uniformly adopting the report of these committees without extended debate.

The total of these standing or permanent committees is 59. The members are elected as above described at each new term of Congress and serve two years until the next Congress comes into office. Besides the Standing Committees there are certain Select Committees which are temporary bodies chosen for the purpose of making an investigation or of conferring with representatives of the Senate to secure an agreement of both Houses upon a measure. These latter are called Conference Committees. When the Senate and House fail to agree on an important bill, a joint or conference committee is appointed consisting usually of three members from each House. Both sides try to secure an agreement upon the bill with as few concessions as possible, but in this "jockeying" process the Senate enjoys marked advantages. Being elected for six years the Senators know that they do not come up for re-election as soon as do the Representatives. The latter body feels most sensitively the pressure of public opinion and dares not go before the people with a record of failure to enact a popular bill. Therefore the House members of the conference are frequently forced to give in, particularly to Senate amendments on appropriation bills, for if the House allowed the appropriation for the executive departments to fail because of mere unwillingness to agree with the Senate conferees the members of the House must bear the responsibility of crippling the Executive. The conference proceedings are secret.

**Conference Committee.**—A typical example of the working of the Conference Committee may be seen in the tariff debate of 1909. The House of Representatives had passed a tariff bill providing for reductions on raw materials such as iron ore, hides, leather, coal and many other raw stuffs. This bill, prepared under the leadership of Chairman Payne of the Committee of Ways and Means was called the Payne Bill. When it reached the Senate a new measure *was substituted for it called the Aldrich Bill, prepared by Senator*

Aldrich, Chairman of the Senate Committee on Finance. The latter measure contained few reductions and increased the rates on many important articles. The Senate adopted the Aldrich substitute which was returned to the House where it was rejected. A Conference Committee composed of both Senators and Representatives under the leadership respectively of Senator Aldrich and Chairman Payne was then appointed to draft a compromise measure which would receive the support of both Houses. This Committee met early in July and sat daily until the end of the month; it was in these sessions that the tariff of 1909 was really made. One of the most interesting and exciting contests in our tariff history was waged in this Committee. Every important business interest affected by the proposed changes brought its full influence to bear upon the conferees; the representatives of the farming States demanded a substantial reduction on manufactured articles. Certain manufacturers' associations urged the retention of the Dingley rates as provided under the old law or even an increase in duties; Senators, Representatives and agents of the various interests besieged the Committee members and even the Speaker of the House appeared before the Committee on the last day of its session. But the climax was reached when the influence of the President was brought to bear. Learning of the crisis in the Conference Committee, he hurried back to Washington from a speech-making tour and began a series of conferences at the White House with the leaders of all factions in the Republican Party. To all of these he made clear his desire for a moderate reduction in the important schedules of the tariff. For some time the President's efforts were not successful as it was doubted whether he would resort to a veto in case his demands were not complied with, but in the last days of the Committee meetings he concentrated all his influence on certain schedules, such as lumber, hides and gloves. He even intimated that if a bill were passed without reductions in these items he would be obliged to veto it and the rumor was allowed to circulate without denial, that if necessary another special session of Congress would be called to draft a revision of the tariff. Despite these efforts, however, Thursday, July 29th, the Republican members of the Conference Committee, who had been sitting in the Senate Office Building behind closed doors, agreed on a compromise bill with high duties, and had summoned the Democratic members for a formal vote of the Committee when there was handed to the Republican leaders a letter from the President containing his ultimatum—lower duties or a veto. This marked the real crisis in the history of the bill. The party managers must either grant the President's demands or open a conflict with him. The Democrats again withdrew, while the Republicans held a four hours' debate in which the chief manufacturing interests affected by the *reduction made a last determined stand.* The *influence of the President's attitude and the knowledge that he was*



able and willing to start a serious conflict in the party finally forced an agreement on his program, the Democrats were then recalled and the report of the Conference Committee was signed. This report was adopted by both Houses and signed by the President as the tariff act of 1909.

The new member entering Congress is apt to be surprised, confused and deeply disappointed by the peculiarities of the Committee system. He may have come to Washington with ambition to shine as an orator but finds that little or no oratory is possible in the House. When a debate finally arises on some important measure he discovers that since he is not a member of the committee having it in charge, it is extremely difficult for him to secure the floor and at most only five minutes is allowed him. Looking over his own committee assignments he is further shocked to realize that he has been appointed to unimportant Committees in whose action the general public has not the slightest interest, such as "Expenditures in the Interior Department." Under such circumstances the new member is often discouraged. But it is the history of the House that the man who goes to work to master thoroughly the business of his committee sooner or later secures recognition and is advanced to other committees of greater importance.

**Advantages and Disadvantages of the Committee System.**—With a House of 435 members and 30,000 bills and resolutions introduced in one session, it is clear that some means must be adopted to reject the worthless measures and to mold the more important bills into proper form for the better information of the House. In England this work is entrusted to a single committee, namely, the Executive Cabinet, but in the United States, since the President's Cabinet is not allowed membership in Congress, the work must be undertaken by Congressional committees separate from the Executive. Furthermore, the different sections of the country and various economic interests must be "recognized," that is they must be given chairmanships in the various committees. It has been found impossible to centralize legislative business according to the British method,—hence our fifty committees with their conflicting schemes of legislation and conflicting claims for the attention of the House. Since each committee feels that its prestige depends upon securing action by the House and the passage in some form or other of a measure which the committee has introduced, the House as a whole, particularly in the latter half of each session, is harassed and worried by committees demanding the immediate adoption of various bills. If we examine the legislation passed at any session of the American House, we find that the measures in question bear little or no relation to each other. While the British Cabinet is able to prepare and carefully work out the plans of legislation for an entire session and to pass these through the House of Commons, our American committees work almost wholly without regard to each other. The effects of committee chaos are notice-

able in all parts of our legislation, but in the field of finance, the results are especially bad. The Committee of Ways and Means prepares the revenue legislation of the country, but seventeen other committees in the House prepare the expenditures without consultation with each other or with the Committee of Ways and Means. The executive departments make up their estimates of requirements for the coming year and present them to the various committees having charge of appropriations, but the latter frequently pay so little attention to the estimates as to reduce them almost one-third or to alter them in other material ways. It has therefore become an important matter to introduce greater unity among the committees and to secure a greater harmony and coordination of the measures passed by the House, particularly those dealing with revenue and appropriations. The Democrats have sought to attain this by electing in caucus a steering committee.

**How Laws are Passed.**—The time of the House is divided according to formal rule, certain days being reserved for special action. An important bill is usually introduced by the chairman of the committee to which it will be referred. The introduction consists of handing the bill to the clerk; its title is then read. The bill is thereupon referred to the appropriate committee, and either allowed to die without further action or is reported back to the House with a favorable recommendation, and perhaps in an amended form. An unfavorable recommendation is never made, because this would only be done for the purpose of killing a bill, and it is much easier to defeat a measure by making no recommendation at all, whereupon it dies a natural death in the pigeonholes of the committee's desk. The committee having drawn up its report to the House, the bill is placed upon the calendar for consideration and second reading. This is not enough to ensure its discussion by the House, however, as there may be a hundred other bills similarly situated. The next step is to secure a definite date for its discussion, and this must be done by an arrangement with the Speaker and the floor leader. The committee having been given a date, the chairman of the committee or the floor leader of the majority party announces the report of the committee. The printed bill is submitted to the members and if it involves an appropriation a motion is made to consider the bill in "Committee of the whole House." In this meeting of the Committee, the bill is read section by section and a number of amendments are usually made and reported to the House. The House thereupon adopts or rejects the bill in this amended form, thereby passing it on the second reading. It is at this point that most bills reported by committees usually fail. Either amendments are introduced which completely neutralize the real object of the bill or the opposition to the measure is so strong as to lead its friends to seek a postponement in the hope of securing a more favorable vote at a later moment. If it runs the gauntlet of the second reading successfully, it is apt to be passed on

the third reading without further action, although amendments may be and frequently are made even at this late stage. On its third reading it is read *in toto* with all the amendments incorporated in final form. It is then passed and sent to the Senate. Usually if it is an important bill the Senate makes additional amendments, and these must be approved by the House before the measure can become a law. If the House wishes to accept the Senate amendments, it can do so without further formality by passing the bill once more in its amended form, and it is then sent to the President. If the House refuses to concur in the Senate amendments, a conference committee is appointed by both Houses. This committee reports the compromise form of the bill, which is then passed. If in its compromise form as adopted by the conference committee, it is still not satisfactory to the House, a new conference is asked from the Senate and the committee again tries to secure a satisfactory arrangement of the measure, which is again presented for acceptance by the House. This continues until the measure is finally either passed or defeated. By reviewing this long procedure through which each measure must pass, we may see how many opportunities there are to defeat legislation and how the weight of inertia is unfavorable to every bill. It is this very inertia of legislative procedure which kills so many measures or offers to their opponents the opportunity of secretly amending them in such a way as to defeat their real purpose. It is also this cumbersomeness of the House procedure which necessitates the concentration of power and authority in the hands of a few men in order to secure legislative action.

**Time-Saving Devices.**—By reason of its large size and the great number of bills and resolutions which are annually presented for action, the House must not only rely upon its Committees, but must resort to every possible expedient to save time. Among the most important of these devices are:

- (1) The previous question.
- (2) Leave to print.
- (3) Compelling a quorum.

The "previous question" is a device copied in modified form from the procedure of the British House of Commons. It is a motion that the question under discussion be immediately voted on. This motion is made by a floor leader or manager of the bill for the purpose of cutting off all further debate. A call for the previous question cannot be argued or discussed, but must be accepted or rejected at once by the House. If carried, the question itself—that is the section of the bill or resolution which has been under discussion—must be immediately put to a vote without further debate. It will be seen that this is a powerful means of forcing quick action by the House on any bill favored by the majority; in fact, it is an invaluable means of suppressing minority filibustering and obstruction. Since the previous question has come so

largely into vogue, the minority has usually submitted to an agreement for a vote at a specified time, knowing that if it does not submit, the previous question will be called for by some member of the majority, and a vote taken at once.

"Leave to print" is the unanimous permission to print a speech in full in the *Congressional Record*. When a member has been granted the floor for perhaps five minutes and his speech is of such length as to occupy much more than the time allowed, he asks for unanimous consent to print the speech in full. This curious system has arisen from the desire of members to send copies of their speeches to their constituents, and as this is a desire common to the entire membership of the House and as a member is much more willing to accept a short allowance of time, provided that he be given leave to print, the unanimous consent required is very seldom denied. Because of this singular practice, the speeches printed in the *Congressional Record* often represent one hundred times the actual extent of the remarks delivered in the House. Abuses of the privilege have at various times arisen; one member is known to have had an entire book copied in the form of quotations embodied in his speech. The abuse has been aggravated by the fact that each member is allowed the franking privilege of sending speeches and other matter through the mail without postage, and is always supplied by the public printer with a large number of copies of his speech, without charge. Recently attempts have been made to correct this evil, and the printing of books as parts of a speech is now prohibited.

The compulsory attendance of a quorum is not often necessary. According to Article I, Section 5, of the Constitution each House may compel the attendance of absent members. The minority party occasionally attempts to break up a quorum by absenting itself from the sessions of the House when by so doing it can bring the attendance below the required number. In this way the proceedings of the House may be delayed until all or nearly all the members of the majority party return to the House. In order to prevent this, the Speaker is authorized to send the Sergeant-at-Arms with his deputies to search for absent members and compel their attendance.

**Officers.**—The Constitution lays no restriction upon the number of officers which may be appointed by the House and a large list of employés and officials has resulted. The more important of these besides the Speaker are the Chaplain, the Clerk, the Sergeant-at-Arms.<sup>1</sup>

<sup>1</sup> There are also the

Doorkeeper

Secretary to the Speaker

Clerk at the Speaker's Table

Speaker's Clerk

Messenger

Four special Committee Stenographers and one Assistant

**Number and Character of Membership.**—The membership has been enlarged after each census with the exception of those of 1840 and 1850. The number under the Constitutional apportionment was 65; at present it is 435.

The members are chiefly lawyers and politicians, of middle age. The salary is the same as in the Senate, \$7,500 annually and mileage. Many members have risen from humble circumstances, few are wealthy and nearly all have simple democratic tastes. One remarkable feature which stands out in strong contrast to conditions in all other important national legislatures is the absence of representatives of the labor class. Even the British House of Commons has its group of 60 Labor Party men, exerting a strong influence on legislation, but in our House the two major parties have hitherto succeeded in maintaining entire control and have made efforts to include labor questions in their respective political platforms. In recent years, however, a number of serious differences have arisen between the majority party leaders and the labor unions, and the formation of a distinct group of labor candidates seems imminent. Many of the more prominent labor leaders now advocate the election of labor representatives to Congress. In the election of 1910 the Socialist party elected its first representative to the National House of Representatives, Mr. Victor Berger of Milwaukee, but he failed of re-election in 1912.

**The Sessions.**—Congress meets on the first Monday of December of each year. The House being elected for two years, the life of each Congress is composed of two regular sessions. The term of office always begins and ends on the 4th of March at 12 o'clock

Chief Clerk in the office of Clerk of the House.

Assistant Chief

Journal Clerk and Assistant

Two Reading Clerks

Tally Clerk

Printing and Bill Clerk

Disbursing Clerk and Assistant

File Clerk and Assistant

Enrolling Clerk and Assistant

Resolution and Petition Clerk

Newspaper Clerk

Distributing Clerk

Document and Bill Clerk

Index Clerk and Assistant

Stationery Clerk

Docket Clerk

Digest of Private Claims (3)

Bookkeeper

Locksmith

Seven additional clerks

Three Assistants in Disbursing Office, Stationery Room and Clerk's Office

Stenographer to Clerk

Messenger to Chief Clerk, etc.

In the office of Clerk of the House there are the clerk and 42 clerks and employes. The Doorkeeper has under his direction 49 clerks, pages and employes. *For the committees there are 75 clerks and assistants.*

noon. The first session of the term is called the long session, lasting usually from the first Monday of December until the end of June or the middle of July. Although some time is usually lost in organizing at the beginning of the session, there is much more opportunity for work, and the real legislation of each Congress is usually accomplished at this time. The second session is necessarily short because the terms of members expire on the next 4th of March and as a rule little is done beyond the passage of the annual appropriation bills.

A meeting of the House presents many interesting aspects to the visitor. One of these is the marked contrast between the beginning and the end of a session. At the beginning there is little or no important business ready for action. Most of the committees are industriously working out their drafts of bills and the daily sittings of the House are taken up by lengthy and uninteresting debates on unimportant questions. But when the leaders have prepared their legislative program a sudden change comes, the dull and trivial measures are unceremoniously whisked off the stage and the real bills of the session are brought out. By this time the session has advanced far towards Spring, the battle between Committees for the attention of the House waxes fiercer, the Senate sends in a mass of bills for consideration and the newspapers begin to call for immediate action on certain measures. The great appropriation bills, carrying millions of dollars of expenditures, commence to take form and to push aside minor interests, the Senate fails to pass important bills sent to it by the House. Conference committees must be chosen and their reports acted on. The numberless private pension bills pile up until they take all the spare time of the House in the evenings. The pressure for legislation grows greater, the hot weather sets in with all its depressing effects in Washington, and there begins a frantic rush which can be likened only to a panic on the stock market. Bills are passed under suspension of the rules and are ground out with astounding rapidity. In the short session when on March 4th, the last day of the session arrives, the President moves down from the Executive Mansion to the Capitol bringing with him a force of secretaries and members of his Cabinet, to consider and sign bills passed at the last moment. On this day the hands of the clock are turned back several times as they move on towards twelve, the hour when the Congress dissolves. At last the bills are all passed and signed, the clock is allowed to indicate five minutes of 12 and some member of the Speaker's supporting clique arises and on behalf of the House expresses its warm appreciation of his impartial rulings and unfailing courtesy! The member further moves a vote of thanks which is seconded with Chesterfieldian politeness by the minority leader and carried by acclamation amid the greatest enthusiasm, the members *singing*, and generally abandoning themselves to the *free enjoyment of relaxation from the arduous work of the session.*

Some one starts up a verse of Auld Lang Syne and with one accord Democrats and Republicans join in the chorus. In the midst of the din the Speaker declares the second session closed and another Congress has passed into history.

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### QUESTIONS

1. Resolved that the House is the most popular branch of the Federal Government. Defend either side of this question.
2. Why were none of the other branches of the Federal Government elected directly?
3. Who is the Representative from your district, and when does his term expire?
4. Which of the following men are eligible to the House of Representatives in 1916? Which are not, and why?
  - (a) John Doe, born 1893 in Chicago.
  - (b) Ricardo Roelo, born in 1880, in Turin, Italy, and naturalized in the United States, in 1912.
  - (c) Henry Long, born in Manchester, England, 1881, and naturalized in the United States in 1906.
  - (d) William Wilkins resides in Chicago, but runs for election to the House in an Iowa district.
5. Does the Federal law prevent a citizen and resident of Los Angeles from being elected a member of the National House from San Francisco?
6. Explain the difference between the original and the present method of apportionment of House members among the States.
7. What does the Constitution provide as to the time, place and manner of choosing Representatives?
8. How do the States apportion their Representatives among the voters?
9. What is a gerrymander? Could Congress prevent it?
10. Explain the "at large" method of choosing Representatives and its advantages and disadvantages.
11. What is proportional or minority representation?
12. Congressman Doe resigns from the House of Representatives. How is the vacancy filled?
13. Congressman Roe after serving one year in the House is discovered to have been elected through bribery in which he took an active part. What can be done?
14. Why are the lower houses in national assemblies usually given the power to propose tax bills? Give some examples.
15. What practical importance has this privilege in the United States and why? Explain the rôle of the House in impeachment.
16. What was the intention of the fathers as to the Speaker's influence? Why have his powers grown?
17. Explain his position before 1910.
18. How could he influence the political careers of members? Give examples.
19. How could he determine legislation? Examples.

20. Explain the changes made in 1910 and 1912.
21. Where is the power now lodged that formerly belonged to the Speaker?
22. What are the powers and duties of the Committee on Rules?
23. What is the purpose of the Committee of the Whole House?
24. Select the Committees that you consider most important and explain why.
25. Explain how they are chosen.
26. What is a "floor leader"? Why is he necessary, how is he chosen, and what are his duties?
27. Compare the party discipline and control, of the two leading parties.
28. What is a "caucus"? Why is it necessary? How does it influence the freedom and activity of the new member?
29. What prevents the caucus from establishing the irresponsible control by a small clique over the party membership?
30. Would you favor or oppose a reduction in the number of members of the House? Why?
31. What is a Conference Committee? Why is it appointed? Explain how it acts?
32. Why has the present complicated committee system arisen?
33. What is "the previous question"? Why is it moved and by whom?
34. Explain "leave to print."
35. What is meant by the recording of the "ayes" and "noes" as provided in the Constitution, and when must this be done? What is its purpose?
36. When is the short session held and why is so little general business transacted during it?
37. If you were a member of Congress how would you expect to rise to greater usefulness and prominence in the work of the House?



## CHAPTER IV

### THE SENATE

**Ideals of the Senate.**—It is in the Senate more than in any other part of our government that we may grasp the political thought of the fathers. Conservatism, Aristocracy and State Sovereignty are not popular to-day, but they were political ideals in 1787. The minds of the leaders at that time were occupied with grave fears lest the new Federal government, which they were about to establish, might overshadow and perhaps destroy the authority of the States. The new government, it was hoped, would strengthen the union against outside enemies, but no one knew what scheme of centralization might develop at any moment. The tendencies of the time presented a conflict between the desire for a national government and a fear of its growth. We are not surprised to find that a political system founded on this conflict of ideas should be one in which conservatism was exalted as a fundamental virtue; hence the peculiar rôle of the American Senate, which has probably changed less in the last century and a quarter than has any other branch of our government.

**Conservatism.**—We are accustomed to look on our Supreme Court as the most conservative influence of our time, but when the Constitution was framed, it was pre-eminently the upper house of the Congress that was designed to withstand the storms and shocks of popular opinion. Its conservatism was safeguarded in various ways. Section 3 of Article I of the Constitution provides a higher age qualification, a longer period of citizenship and a longer term of office than in the House, also that only one-third of the Senators shall retire from office at one time, thereby keeping a majority of two-thirds of the members who are experienced and familiar with public business. But the contrast between the Senate and the House is even more marked than appears in the Constitution. A glance about the Senate chamber shows that the members are as a rule past middle age. A recent count of the membership showed that approximately one-half of the Senators were sixty or over, while seventeen of them were over seventy. One reason for this is to be found in the peculiar political conditions of the States. In order to be elected Senator a man must either possess great wealth and be in position to command the influence of the political leaders of the State, or he must himself be the political leader, or he must be one who enjoys the confidence and trust of the industrial, commercial or other interests which may dominate the politics of the commonwealth. In order to satisfy any one of these three

requirements, a man must have been in the arena of business, the law, or politics, for many years. There is thus imposed, from the very nature of the conditions a much higher age qualification than that required by the Constitution.

Then too, the small number of members in the Senate, 96 at present, acts as an influence towards caution by promoting the free discussion of all measures, while the House, through its large membership, has been severely restricted and its usefulness impaired. It is noticeable that a measure which may escape amendments in the House is oftentimes subjected to such a running fire of comment, criticism and essential change in the higher body, that it can hardly be recognized when returned to the Representatives for their approval. Furthermore since many of the Senators are men of wealth, their natural inclination is toward the protection of stable property interests and their influence is thrown in this direction.<sup>1</sup>

**Aristocracy.**—The statesmen of 1787 were aristocrats; they were the leaders of an uneducated populace. The masses of the voters, possessing none of the modern means of learning the latest happenings throughout the country, and being but slightly affected by public opinion outside their immediate locality, took their views from the leading local politicians, in a fashion which is now seen only among the most servile political elements of our large cities. The leaders of the time nominated candidates for office at private conferences of the select few; they believed in a government of the people by "the best" of the people. Therefore they believed also in indirect elections and a restricted suffrage. The indirect election of the Senate by the State legislature was intended to throw into the hands of the best people of the State, the power of choosing Senators, and thereby avoid the excitement, agitation and violence of a popular election.

**State Sovereignty.**—In a time when the States commanded the first allegiance of the people and the national interests took second place, the sovereignty of the individual commonwealths appeared most sacred and its protection was to be carefully safeguarded in the Constitution. This was achieved by the requirements of Section 3, Article I, that each State should have an equal number of Senators and that they be chosen by the legislature. Delaware and

<sup>1</sup> The plan of having two houses in a legislature is so old as to make it seem an instinctive idea in politics. The earlier legislatures had an even larger number of houses. In the Parliament of Edward I of England at the close of the thirteenth century, there were four bodies, representing the Clergy, the Nobility, the Knights and the Town Burgesses. Later the Clergy sat with the Nobility, while the Knights and Burgesses voted together. The four "estates" thus became two, known as the Lords and the Commons. Most of the American colonies before the Revolution had two Houses, the upper being the counsellors of the Royal Governor, while the lower was a popular assembly. This thought of the upper House as a council for the Executive undoubtedly influenced the powers of the Senate and made that body an executive as well as a legislative assembly.

Rhode Island were made the peers of the great commonwealth of Virginia. The basis of representation was one of the most serious problems that the constitutional convention had to face, and threatened at one time to break up that body. Under the Articles of Confederation all the States had an equal representation in the legislature, irrespective of size of population,—a purely *Federal* form of government. In the convention, many delegates, especially those from the smaller States, favored retaining this method, and objected to any form of representation proportioned to population, which had been suggested by the larger States. An assembly made up of delegates according to population would have been a purely *national* form of government, and the smaller commonwealths opposed this on the ground that it would give the larger States too much power in the Government, and would also fail to represent the States as separate and individual entities, thus encroaching on their sovereignty. The matter was finally referred to a compromise committee, which suggested that the lower House should be composed of members chosen by popular vote, according to population, and the upper composed of two delegates from each State, chosen by the legislature. This compromise was accepted by the convention, and in this way the *national* idea of proportional representation was blended with the *federal* idea of retention of State sovereignty.

**Qualifications.**—The Constitution requires that a Senator shall be thirty years of age, nine years a citizen of the United States, and a resident of the State from which he is chosen. While these qualifications insure a body of mature men, the natural conditions under which Senators secure office have still greater force in raising the age standard, as we have seen. The fourteenth amendment also excludes any person, who having previously taken an official oath to support the Constitution, shall have engaged in insurrection or rebellion against the United States. Congress has made use of its power to remove such disability in the case of Confederate soldiers, so that no persons who engaged in the Civil War on the Confederate side are now disqualified for that reason. An ineligible person may act as a member of the Senate or House if no one calls attention to the lack of qualification. Henry Clay was a member of the Senate before he was thirty years old. No State may constitutionally add to the qualifications of members of Congress.

Each House is sole judge as to the qualifications of its own members. In case of disputed elections, or charges of fraud, or questions involving the integrity or the identity of prospective members, each House may decide for itself whether it will accept as a member the person in question. Each also has the power to punish any member for disorderly conduct by reprimand, suspension, or otherwise, and even to expel, provided a two-thirds vote is obtained in this latter case. To deny the right of admission, a simple majority vote is all that is necessary. A final qualification, before an

elected member may take his seat, is the taking of an oath to support the Constitution, before the body to which he has been elected.

**Term.**—The term of office of the Senate is six years. Various terms were proposed in the constitutional convention; the terms of the colonial legislatures varied from one to seven years. It was felt that the upper House of the Congress should be chosen for a period which would insure abundant opportunity to become familiar with the public business, and the fact that the Senate was not intended to be a popular body made this longer term acceptable. The upper houses in foreign countries have either a six year or a longer tenure. In England membership in the peers is hereditary, in France the Senate is chosen for six years; in Germany each member of the Federal Council or "Bundesrath" retains office indefinitely until his State government chooses a successor. But in America a six year term is unusual. All our official tenures have been made short and elections frequent, in order to keep power in the hands of the voters. The term in most of the State legislatures, as well as in the House of Representatives, is but two years. It was made longer in the Senate in order to render that body more stable and conservative, to free it from the influence of frequent political changes, and to make possible a permanent and consistent policy. The greater permanence so attained has proved a strong and helpful influence in the work of the upper House. Says Mr. Bryce, "A Senator has the opportunity of thoroughly learning his work, and of proving that he has learned it." Owing to the Senator's political or financial power in his State, he is usually re-elected for a second term and frequently for several terms in succession. For the same reason a Senator having once been defeated for re-election seldom succeeds in regaining his office, since the new leader takes it for himself. The clause providing that only one-third of the body shall be renewed every two years has worked admirably. This division into classes was made by lot when the first Senate assembled in 1789. Care was taken not to place any two Senators from the same State in the same class. When a new State is admitted to the Union, its Senators are placed by lot in these classes, only one being added to any one class, and in such a manner as to keep the classes as nearly equal in number as possible. When a vacancy occurs the new member chosen to fill the vacancy is elected for the unexpired term.

**Election of Senators.**—The Constitution provided that Senators should be chosen by the legislature of each State but did not say how this choice should be regulated. The Federal law of 1866 provided that each house of the legislature should vote separately. In case the houses did not agree, they should come together in a joint meeting after the second Tuesday of the session and elect the Senator by a majority vote of all present. While the election of Senators was purposely made indirect in order to remove it from the people, the same change had begun to take place as in the

choice of the President, that is, the election had gradually become direct in reality, although remaining indirect in form. When the legislature was to be chosen, every voter knew who would be chosen Senator, if certain legislators were elected. In fact, the choice of a Senator usually overshadowed all other issues at the polls, so that a legislator was often known as an adherent of this or that candidate for the Senatorship.

Meanwhile popular sentiment favorable to the choice of Senators by direct election had been steadily growing since the middle of the last century. Repeatedly the House of Representatives had passed a constitutional amendment providing for the change, but the Senate either rejected the proposal or allowed it to die without action. There can be no stronger evidence of the un wisdom and even danger of our present difficult method of amendment than the obstacles encountered by the movement for direct election of Senators. For many decades there has been a clear and undoubted preponderance of opinion in its favor, yet the opposition of the very house whose modernization was to be wrought was sufficient to block the movement for half a century.<sup>1</sup> The Western States, ever in the vanguard in the search for better methods of government, began to pass laws providing for the expression of popular preference for Senators as a guide to the State legislatures in the election. Of these laws the Oregon statute of 1904 is a fair type.

<sup>1</sup> Many strong objections were urged against the indirect method of choice. The chief of these were the accusation of bribery which frequently occurred in Senatorial elections; the danger that the State, in case of deadlock, would lose its representation in the Senate, several legislatures were deadlocked for two and three years; and the inevitable confusion of State and national issues resulting from having a national official like a Senator chosen by State legislators. The danger of bribery was constantly present nor could it be avoided so long as the influence of a very few votes in the legislature determined the choice. The situation was always like that arising in a nominating convention where a few delegates hold the balance of power as between the different candidates. The influence of the Senatorial choice upon State legislation and State politics generally was also unfortunate. In our modern system of politics, the political leader of the State is often a Senator. To this there can be no valid objection. In fact, it is an advantage to have the leader take public office. But when his acts are attacked it may become necessary for him to defend himself by subordinating the entire policy of the State to the one issue of continuance in office. In this way there arises confusion between those matters which affect national government and those which are properly questions of State policy. There is no reason why the voters at a State election should choose a member of the legislature who makes laws on the school system, public health and local conditions throughout the State, but at the same time also chooses a Senator to vote on the tariff, the currency, our foreign relations and other national matters. State questions should be settled separately. Yet this becomes impossible the moment that they are mixed up with the election of a national Senator.

Furthermore aside from the possibility of money bribery the astute leader of a small faction either in a convention or a legislature knew the vital importance of the votes which he controlled to the conflicting interests in the struggle, and he was able to exact concessions and make deals that were injurious to the public welfare. The indirect system had long fallen into disrepute throughout the country.

This act provided for the nomination of Senators by their respective parties in the regular party primaries. Then, in the general election following, party nominees were voted for by the people, and the candidate receiving the greatest number of votes in the election became the "people's choice" for Senator. The same act provided that a candidate for the State legislature might, if he chose, subscribe to one of two statements—either a promise to vote "for that candidate for Senator who has received the highest number of the people's votes for that position," or he may "Consider the vote of the people for United States Senator as nothing more than a recommendation which I shall be at liberty to wholly disregard if the reason for doing so is sufficient." Needless to say, most of the legislative candidates signed the former and thereby pledged themselves to vote for the people's choice for Senator. The legislature, in this way, gave a formal confirmation to the popular expression of opinion and there was in reality a popular selection of Senators in the commonwealths adopting this system. Gradually the movement spread southward and eastward until thirty States had provided for informal popular selection. At this point, when it became evident that the agitation had reached the dignity of a universal movement against the Senate, that body capitulated and allowed the passage of a House resolution providing for a constitutional amendment. The proposal was then submitted to the legislatures of the States, approved by the necessary three-fourths, and officially proclaimed by Secretary of State Bryan, May 31, 1913, as Article 17 of the Amendments. Its provisions are as follows:

"The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

"When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

"This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution."

Both Senators and Representatives are obliged by Federal law to make public their campaign expenses for both nomination and election.

**Exceptional Position of the Senate.**—Since the Senate embodied most faithfully the political ideals of 1787,—conservatism, aristocracy and State sovereignty,—it was natural that the framers should wish to give that body as much influence as possible in the govern-

ment. Its position was made one of exceptional authority, higher than either the President or the House,—it is first, a legislative body co-equal with the House excepting on finance bills; second, it is a court ordained to try cases of impeachment; third, it enjoys extensive and important executive powers and can thereby take part in treaty-making and in the administration of the law. As a legislative body it is supposedly on a par with the lower House, except in the case of bills for raising revenue, which according to Article 1, Section 7, must originate in the House; but in reality it is a much more influential assembly, in all forms of legislation, than is the lower chamber. It is a common occurrence for the Senate to attach important amendments to appropriation bills and to compel the House to accept these amendments. This it can do because the House having a shorter term of office must be the first to come up for re-election and must bear the brunt of public indignation if important appropriation bills or other measures are allowed to fail through a disagreement between the two bodies. The House members knowing this accordingly give way. This applies to all important measures to which the majority party is committed. If the party cannot bring the two Houses to an agreement its pledges are not fulfilled, it must suffer, and the Representatives are naturally the first to feel public disfavor.

The Senate is well aware of this advantage and makes the most of it. As a body, however, it seldom arrays itself openly against party or popular measures for any great length of time. It may amend and modify an important bill or delay its passage or resort to numerous other expedients of committee procedure to defeat legislation but is seldom placed in the disadvantageous position of the English House of Lords when the latter attempts to defeat a popular bill which is resolutely pushed by the House of Commons. In such a case the entire machinery of the government and the force of public opinion are lined up against the upper House and the issue soon becomes a conflict between the people and a privileged class. It was such a struggle which led the Liberal party to amend the constitution of the Lords in 1911 and deprive it of its absolute veto power. The fact that our Senate avoids such contests is another reason for its continued supremacy in legislation. Power, like mercury, tends to flow together. As between the Senate and the House one must dominate. In all European countries except Germany the lower House has won the struggle for mastery because it is directly chosen by the people. It has championed their cause against hereditary rights and aristocratic privileges, as represented in the upper chamber. But in the United States the upper House has kept its superiority, by reason of the unusual ability and training of its members, by the free discussion of bills in the Senate which is impossible in the House, and by those peculiar constitutional prerogatives and exceptional privileges which have just been outlined.

In impeachment, the Senate's position is that of a court. The House of Representatives, as we have seen, passes the resolution of impeachment, and a committee of Representatives is appointed to prosecute the case. This Committee employs counsel, the evidence is prepared, and, at a time agreed upon, the Senate, presided over by the Vice President or the Chief Justice, hears the case, giving the accused also the right to be heard, to employ counsel and summon witnesses. In the impeachment trial of President Johnson in 1868, every partisan and factional influence was brought to bear, much bitterness of personal feeling was aroused and a large vote in favor of conviction was finally secured, but the total failed of the necessary two-thirds majority by a single vote. Since this great trial it has been generally conceded that the remedy of impeachment has little practical significance, but is to be considered solely as an extraordinary measure. Only nine impeachment trials have been held by the Senate in the history of the government: the accused persons being William Blount, a Senator, in 1799; John Pickering, a U. S. District Judge, in 1804; Samuel Chase, Justice of the U. S. Supreme Court, in 1805; James H. Peck, a U. S. District Judge, in 1831; W. H. Humphreys, a U. S. District Judge, in 1862; Andrew Johnson, President of the United States, in 1868; William W. Belknap, Secretary of War, in 1876; Charles Swayne, a United States District Judge, in 1905; and Robert W. Archbald, a judge of the Commerce Court, in 1913. Of the nine, three, Pickering, Humphreys and Archbald were removed from office. In the case of Blount the offence with which he was charged, that of receiving money for an appointment to the United States Military Academy, was admitted by him but the Senate held that the process of impeachment was not intended by the Constitution to apply to a Senator or Representative. The ground of this decision was that, historically, impeachment had always been used as a protection against executive officers. A Senator being a legislator could therefore not be considered an "officer" in the sense intended by Section 4 of Article II. As the Senate is the final tribunal in all cases of impeachment, the Blount decision remains as a precedent.

As an executive body, the Senate approves treaties and appointments. It does this in "executive session," which means that all spectators and newspaper correspondents are temporarily excluded from the Senate Chamber and no record of debates is kept, only the final results of the Senate's action being made public. It is doubtful if such secrecy is desirable or necessary at present. The main object of secrecy is not attained, as news of the proceedings leaks out in one way or another.

In its approval of treaties (by two-thirds) and important appointments (by a simple majority) the Senate exerts a political control which has already been discussed in connection with the President's duties.

Through its treaty power the Senate exercises a strong influence



on foreign relations, and recent events seem to point to an extension of this influence. Its Committee on Foreign Relations takes an active part in fixing the terms of foreign agreements, being consulted by the President on all important steps.

The co-operation of the Senate with the State Department has become less and less harmonious in recent decades owing to its resentment at the leading rôle played by the President and all the executive departments. From the time of Cleveland's second administration down to the present many treaties have failed of ratification in the Senate including such important agreements as those on international arbitration, the purchase of the Danish West Indies, and a number of commercial reciprocity treaties strongly advocated by President McKinley. Others have been delayed by opposition in the Senate to such an extent that some embarrassment has been experienced by the President, notably in the Cuban reciprocity, the San Domingan debt and the Canadian reciprocity treaties, while still others have been so amended as to cause their abandonment by the Executive.

Many of the less important matters that have come up in our relations with foreign nations have always been settled by the President through executive agreements or protocols, carried out without senatorial action. The Senate attacked this method of dealing with foreign nations, by requesting the President to submit the San Domingo protocol of January 20, 1905, to it for ratification.<sup>1</sup> After considering the matter, the Senate failed to ratify this agreement, but the President immediately carried out its terms to a large extent, through the use of his executive powers, and in 1905, he was attacked in the Senate for so doing. His course was, however, strongly defended by several Republican members and eventually approved by the Senate.

This brings up the interesting practical question, what determines the victory in a struggle between the President and the Senate over the ratification of a treaty? The advantage is with the President because he can propose the substance and form of the treaty, in short he can choose his own ground and the exact time and way in which to open the question. If he proposes something which is strongly popular with the voters he is in position to force the Senate leaders into line even against the wishes of that body. An instance of this is the Canadian reciprocity treaty of 1911, already mentioned. After the Senate had refused to pass the treaty at the session of 1910, an extra session was called to consider the measure, in April 1911. Meanwhile the majority party had been chastened in spirit by the unfavorable elections of 1910, the Senate was still Republican but by a small margin and the House was strongly Democratic. With the pressure of public sentiment in the Missis-

<sup>1</sup> The protocol provided for the collection of San Domingan customs duties by an American official and the use of the funds so collected to pay interest on the San Domingan debt.

sippi Valley, the West, and the South, to back him, the President returned to the charge and forced the treaty through the Senate. It was afterward defeated in Canada.

The power of the Senate is undoubtedly greater to-day than it was at the beginning of the government, although Senators often argue to the contrary. In the earlier days, Senators were looked upon as ambassadors of their respective States, limited in their individual discretion, and subject to instructions from the legislature which had elected them. Until about 1825 the Senate was not regarded as of equal importance to the House of Representatives, or even to the State legislature. Men often preferred leadership in their State legislatures to what was considered "the somewhat empty honor of the senatorial dignity." This condition was changed mainly in the three decades preceding the Civil War, due to the presence of a few brilliant statesmen like Clay, Webster, Calhoun, Benton and Sumner. During this period the Senate established its claim to intellectual leadership of the nation in political matters, and became famous among the legislative bodies of the world. It began to assert its power in the struggle against Jackson, and although it did not succeed in gaining the upper hand at once, its influence was augmented, and it was able to force the weaker men who followed Jackson to admit its power. After the war, the Senate was able to wield its authority even more completely and succeeded in defeating the independent policy of Johnson, and in imposing its views on Grant, largely on account of the latter's inexperience in political affairs. Cleveland was more successful than his predecessors in overcoming the opposition of the Senate, and the struggle became even more marked during the administration of Roosevelt.

Political leadership in a State is usually held by one of the two Senators and, where authority is equally divided between the two, an amicable arrangement is made to divide the State territorially, each Senator having control of appointments and other matters in his section of the commonwealth. Before the political revolutions which began in 1908 the dominance of each Senator in his party was so complete and unquestioned that the political machines of the two parties were able to "steam roller" all opposition. But with the coming of more flexible and unsettled conditions in the party management, there is greater room for men with some tendencies towards independence of thought and action.<sup>1</sup>

<sup>1</sup> The influence of practical politics on the character of the Senate is well depicted by Prof. Paul S. Reinsch in his *American Legislatures*, page 120: "The advantageous position of the senators with respect to the control of party machinery was recognized as soon as the Senate had made good its powers over the federal patronage. Professional politicians, whose chief stock in trade is the procuring of public office, soon developed a vivid interest in the senatorial position. Before long, men who were supremely successful in the organizing of the political forces of the State, claimed for themselves the high honor and the potent influence of the senatorship; and they often gave the position of junior

**Senate Committees.**—Each Senator is a member of from six to eight committees. As most of the members are re-elected from term to term, promotion in committees is slow, being dependent upon new vacancies. The new member is usually given unimportant appointments. The influential committees are Appropriations, Finance (corresponding to the Ways and Means in the House), Commerce (including Shipping), Interstate Commerce, Foreign Relations, Post Offices and Post-Roads, Judiciary, Naval Affairs, Military Affairs. The new Senator is not apt to find his name on any of these; rather will he be entrusted with the care of such committee subjects as, the Condition of the Potomac River Front at Washington, Indian Depredations, Civil Service and Retrenchment, Disposition of Useless Papers in the Executive Departments!

Under the rules the committees are chosen by ballot, but in practice each party, in its caucus, makes up a list of its members for committee appointments, the majority party conceding to the minority a number of members on each committee in proportion to the strength of the two parties in the body. Each caucus having decided the allotment of its party members a motion is introduced that the committees of the Senate shall consist of the members named on the list. This motion being contrary to the rules which provide for election of the committees by ballot, it is necessary to have unanimous consent in order to suspend the rules. Such consent is uniformly given. In the party caucus it is customary to have the committee "slate" for the party made up by a committee on committees which until 1913 was appointed by the chairman of the caucus, but is now elected.

The chairmanship of each committee is given to the member who has served upon it continuously for the longest term. A continuous service in the Senate is in this way of great practical advantage to a member in that he obtains a larger number of committee chairmanships. It is apparent that this system, by depriving the Vice President of the power to name committees, prevents him from securing the same influence which the Speaker of the House has attained. The Vice President is merely an impartial chairman to preside over the debates. It is also clear that those States which re-elect their Senators term after term soon secure representation on the important committees and a large number of committee senator to a personal ally whose chief political qualification consisted of liberal campaign contributions. The direct control which the party machinery exercises over the state legislatures, and over the workings of the caucus system, makes it essential to the senator, if he be not himself the boss, at least to court the good graces of the party magnates. He must be a master of practical politics. Indeed, most senators, often against their personal likings, find that the major portion of their time is taken up with the nursing of political support at home. This development has introduced into the Senate a class of prominent politicians, who are often lacking in those qualities of statesmanship which the traditions of the Senate demand, who are simply shrewd players of the intricate game of *local politics, and who have introduced commercial ethics into political life.*"

chairmanships and thereby wield a commanding influence in national legislation.

As a matter of fact, the New England and Eastern States have always been the most consistent in their policy of re-electing their Senators for term after term, while the Western States more often elect a new man every six years. This largely accounts for the dominance of New England in the Senate, a dominance of which Westerners complain. It is very seldom that a Senator from one of the New England States is not re-elected, if his party continues in power, in fact he generally holds office until he retires, or dies. He gains in influence not only through the automatic rule that important committee places are determined by seniority, but also through the accumulation of experience, a better knowledge of the work of the government,<sup>1</sup> and thus a greater fitness and ability for dealing with public questions. With the breaking up of the solid Republican phalanx of ultra-conservatives in the Senate, some of the members of longest terms of service have been retired, and the adoption of the direct method of choice shows a disposition both east and west to change the membership of the upper House more frequently.

**The Steering Committee.**—The Senate majority feels, although to a less degree, the same need for arranging and systematizing its legislative program as exists in the House, and has adopted the same means of doing so; viz., the Steering Committee. This body is not elected by the majority caucus but is largely a self-constituted gathering of the principal leaders. Its work is to determine which bills shall be pressed for passage at each session. Since, as in the House, the natural inertia of procedure tends to defeat a bill, it is usually not necessary for the Steering Committee to determine which bills shall be defeated. Its sole function is to select some important fundamental measures to which the party is pledged and to secure sufficient unanimity of opinion among the members to obtain the passage of its bills. This committee forms the embryo of a Senate machine or organization, but it does not use its influence in the same obnoxious, arbitrary way that was so characteristic of the old House machine. In fact its principal weapon in all attempts to secure unanimity among the majority of members is the appeal which it makes for the support of the party interests. The measures which it does not support are left to the individual judgment of each Senator.

**Senate Procedure.**—Unlike the House, the Senate allows full freedom of debate; each member may speak as long as he chooses on any subject and as often as he can secure the floor. Such a rule of debate has serious disadvantages. On the one hand it allows a higher standard of courtesy and etiquette in the legislative body;

<sup>1</sup> Former Senator Beveridge has explained this influence of seniority in an admirable article "The Control of the Senate," *Saturday Evening Post*, June 4, 1909.

it is not possible for one man as presiding officer to choose who shall speak, what measure shall be discussed and what views shall be expressed on these measures. Furthermore the freedom of discussion gives full play to individuality and the development of real statesmanship. The membership of the Senate includes many men of the highest ability and in urging the claims of their respective interests and constituencies they show brilliant qualities as advocates, orators and strategists in debate. In this respect the Senate ranks far above the House and is the peer of any legislative body in the world. In listening to a Senate debate, one is impressed by the maturity, dignity and admirable forensic training as well as the substantial qualities of the participants. But on the other hand the Senate is now nearly four times the size contemplated by the fathers of the Constitution and the privilege of unlimited debate shows certain marked weaknesses; a small clique of members may hold up legislation desired by the majority and, by talking *ad libitum*, may prevent the passage of a measure to which the party is pledged. This abuse is not confined to either party but is common to both and is employed by the opponents of both bad and good measures. It is a highly obnoxious habit now regarded as a traditional right by the members of the upper House. A noted instance of this was Mr. Quay's speech on the tariff in 1894 which lasted for three days, when by arrangement with his friends he managed to prolong his "remarks" to such a point that the managers of the majority party were forced to change the pending bill to suit his wishes. A similar case occurred in the debates on the repeal of the compulsory silver purchase clause of the Sherman coinage act in 1891 and 1892. At this time a small group of Senators, representing silver money interests, banded themselves together to defeat the repeal, and although the country was rapidly plunging into a great financial and industrial panic, they successfully prolonged the debate against the measure advocated by the majority party, until the disastrous crisis of the following year swept over the country. The impression made upon the public mind by these two cases was so painful that it is doubtful if the "courtesy of the Senate" as the privilege of unlimited debate is sometimes called, would survive another such strain. The majority party has it in its power to remedy this abuse by the adoption of a rule of procedure providing for the "previous question." Thus far no such action has been taken because all the members feel the necessity of maintaining the greatest possible freedom of debate. The disadvantages of the procedure in the lower House, where the "previous question" rule prevails, also serve to deter Senators from adopting a similar rule.

For many years the Senate has sought to lessen the abuses of free and unlimited discussion by a series of voluntary agreements among members as to the time for taking votes on various measures. *The leading advocates* and opponents of a bill make an amicable

arrangement for a vote on a given date, with the understanding that each of the members shall take his own opportunity to present his views meanwhile. This arrangement is then ratified by the Senate and the measure finally passed or defeated at the time set. But it will be noticed that such a means of preventing useless waste of time depends entirely upon the good will of all the Senators. If a small faction of the membership should oppose the arrangement it could not be carried out. On all measures involving extreme partisan feeling, the minority is thereby enabled to defeat final action if it is willing to go to the extreme of "filibustering."

**Officers.**—The officers and employés of the Senate are numerous, the "pay roll," like that of the House, being somewhat inflated. The Vice President of the United States is ex-officio President of the Senate, there are also the President pro tempore of the Senate who is elected by the body from among its members and serves regularly when the Vice President is absent, the Chaplain, the Secretary and a large staff of assistants, the clerks and messengers of Committees, the Sergeant-at-Arms and Assistant, the Postmaster, the Superintendent of the Folding Room and Assistant and the Chief Engineer and assistants. Of these, the President pro tem is the only member of the body.<sup>1</sup>

**Low Salaries.**—The Senator's salary is \$7,500; the Vice President receiving \$12,500. Each Senator is also entitled to an allowance of \$1,200 for clerk hire and a mileage of 20c per mile in going from and coming to each session. The same allowances are made for members of the House of Representatives. Numerous but fruitless efforts have been made to reduce them, particularly the mileage which is admittedly excessive. Members draw their mileage even when an extra session ends immediately before the beginning of the regular session and they are thus prevented from going home. Some members even go so far as to appoint a relative or figurehead as clerk, draw the \$1,200 paid for this purpose and employ a stenographer at half the amount. These allowances are looked on as harmless perquisites of the legislative office and are winked at by both Houses. The salary is far below what it should be, at least \$10,000 should be paid in both Senate and House. The necessary expenses of a member of either branch of Congress are so great that the present salary frequently does not cover them. While it is possible that a very poor man might find the salary of \$7,500 sufficient for his needs, a Representative or Senator who aspired to some influence in the legislative councils would be unable to make both ends meet, without some private income. Since 1800

<sup>1</sup> A full statement of the details of Senate and House organization and personnel with committee assignments, clerical force, residences, etc., is found in the annual Congressional Directory. Both the Senate and the House publish at the close of each session a history of Senate (House) bills and resolutions, from which the action taken by each House on every measure introduced can be accurately traced. This is a valuable source of information as to the details of procedure on particular bills.

both parties in the government have laid great stress upon democratic simplicity and lack of ostentation. It has been considered a virtue to keep down salaries even to the point of parsimony. This was eminently fitting among a nation of pioneers in a new country. But with the general rise in the standards of living and of income in other positions, it cannot be wise to pay the national legislators proportionately on such a low plane. The necessity for a higher salary is less felt than in the House, because of the greater honor of Senatorial rank. All observers have commented on the attractiveness of Senate membership. Its political influence, social prominence, more secure tenure, and the marked ability of its members have made membership in that body, a prize to which many of the ablest and most gifted men in the political circles of all the States aspire. Some of its critics have called it "the finest club in America."

**New Influences in the Senate.**—Until recent years our upper House has been known as the stronghold of ultra-conservative influences. Both the Democratic and Republican parties have sent to that body able lawyers and successful business men trained in the old school of constitutional law and politics. The political leader in each State, the successful corporation attorney, the wealthy manufacturer, or mine owner have been conspicuous figures in our upper House since the Civil War. It was natural that such men should act with caution in the political struggles of the national arena, and that the measures proposed by the Senate, and its influence on House bills should be conservative in tone. Such an influence is needed in every government, and the Senate has performed a function of the highest value in examining the proposals of the House, and asking regarding each measure such questions as—

Is it constitutional?

Does it fit in with the other laws on the subject?

Does it interfere with existing interests in any way?

These queries can only be put and answered properly by a body of men possessing the peculiar training of our Senators. But all virtues have their limit. By its absorption in defending vested interest, the Senate gradually began to ignore the welfare of the masses. Certain of its members were known to represent the manufacturing interest, others the mining interest, while a large group were known as railroad Senators. The votes of any of these men on a given measure could be as accurately forecast as the opinions of their clients and it was not long before this unwholesome condition began to dawn on the public mind. Having gained a reputation of hostility to progressive laws, the reorganization of the Senate became only a question of time. This change has been effected along two lines,—the direct election of Senators and the change in its personnel. Responding to the popular feeling that *economic and social progress must not be held up by the upper*

House, there have been elected to that body a number of younger men whose sympathy, aims, and ambitions are radically opposed to the fixed traditions of former times. Indiana, Wisconsin, Minnesota, Oregon, Iowa, Kansas, Colorado, Nebraska, and other Western States have sent to Washington to represent them, men whose tendency was not to stop with the question—is it safe or is it constitutional? but who have rather concentrated their attention on the new programs of law-making and government regulation for the benefit of the farmer, the small manufacturer, the small shipper on the railways and the masses of the people generally. The advent of these men from both Democratic and Republican States has marked a turning point in our national development and a new line-up of forces in the political arena.

The significance of the new movement lies in the change which it has wrought not only in both parties but in the character and temper of the Senate; that body has been brought nearer to the people and has avoided the hostile public movement which directed itself against the House of Lords in England. By representing popular interests equally with those of concentrated wealth, by standing for the small business men and wage earners as well as the more effectively organized economic groups, the Senate has lost little if any of its real conservatism. The patriarchal rôle which the upper House has always played in every government requires that the elder statesmen shall survey with fatherly eye the entire membership of the political family, the weak as well as the strong. In resuming this rôle the Senate has strengthened its control over the government and fortified its influence as a bulwark against impracticable and dangerous forms of law. Its work is greater and more important in the new era which we are now entering than in the past,—the task of analyzing with clear legal and business insight the many crude proposals for government regulations, of selecting those which are feasible and progressive and of translating them into the accurate, precise and valid terms of national law. Such a task demands the full measure of ability, ripe experience and legal training possessed by the Senate; if properly fulfilled it also means a new ideal of conservatism.

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#### QUESTIONS

1. Who are the Senators from your State, and when do their terms expire?
2. What are their committees and which measures are they actively supporting?



3. Why was the Senate originally given so much power and influence in the government?

4. Explain the ideals of the "fathers" in establishing the Senate.

5. How did they make the Senate conservative?

6. Why did it seem desirable to make the Senate somewhat aristocratic and how was this accomplished?

7. Why was so much weight laid upon representation of the State as a State and how was this arranged in establishing the Senate?

8. Explain the difference between the National and the Federal ideas as they are woven together in our National legislature.

9. Explain which of the following men are eligible to election as Senator from Illinois in 1916 and which are not, and give the appropriate portions of the Constitution:

(a) Henry Higginson, Jr., born of Massachusetts parents in Boston, 1885, removed to Chicago 1914.

(b) Jan Jansen, born in Christiania 1884, immigrated to Minneapolis in 1900, was naturalized an American citizen in 1906 and removed to Springfield, Illinois, in 1914.

(c) Boris Romanof, born in St. Petersburg 1886, migrated to New York in 1889, was there naturalized in 1910, and removed in 1911 to Chicago.

(d) Richard Roe, born 1889 of American parents in Evanston, Illinois, where he has since continued to reside.

10. Senator X is accused of bribery in securing his seat in the Senate. How can his colleagues constitutionally remove him from the body?

11. John Doe satisfies the constitutional qualifications for admission to the Senate but it is discovered after his election that several years before he had forged a check. Can he be denied admission to the Senate? Reasons.

12. The legislature of Pennsylvania passes a law providing that Senators from that State in the future must own not more than \$50,000 worth of property. Is the law constitutional? Reasons.

13. Compare the term of the Senate with that of foreign upper houses.

14. Explain the advantages of a long term.

15. Compare the present and former method of electing Senators.

16. In a debate you are asked to defend the old method. Outline your arguments.

17. You are called on to defend the new system.

18. How did the Western States previous to the 17th Amendment establish a popular choice of Senators?

19. What is the difference between the Senate and House methods of choosing presiding officers? Reasons for difference.

20. How are vacancies in the Senate filled under the 17th Amendment?

21. How does the legislative power of the House differ from that of the Senate according to the Constitution? How does the Senate's legislative power exceed that of the House in practice and why?

22. Explain the Senate's position and duties as a court of impeachment.

23. What is the extent of punishment in case of impeachment? Illustrate.

24. Why are Senate bills better prepared than House measures as a rule?

25. What is meant by "executive session" of the Senate?

26. Explain the exact control of the Senate over treaties and any recent uses which the Senate has made of this power.

27. Which are the important committees in the Senate and how are they chosen in practice?

28. Why is it an advantage for a State to have its Senators serve for several terms?

29. Explain the work of the Steering Committee of the Senate.

30. Explain the most important points of difference between the Senate and House procedure in debate.

31. Why is "filibustering" so easy in the Senate?

32. *What is the salary and the allowance of the Senator?*

33. A law was passed in 1909 raising the salary of members of the Cabinet from \$8,000 to \$12,000. Can Senator X, a member of the Congress which passed this bill, resign after one year's service in the Senate and accept a Cabinet position? What clause of the Constitution applies?

34. A United States Senator while in attendance at a session of the Senate assaults a man in the streets of Washington. Can he be arrested? Suppose he commits murder, can he be arrested? What clause of the Constitution applies?

35. During a debate in the Senate, one of the members falsely charges the head of a great corporation with perjury and bribery. What redress has the latter? What clause of the Constitution applies?

36. Besides legislative powers, what executive and judicial powers does the Senate exercise?

37. Explain the most valuable service performed by our Senators in law-making and show how the body is peculiarly adapted to its duty.

38. Point out recent changes in the attitude and personnel of the Senate and the reasons for them.

39. Prepare a short essay on the value of the upper House in American government.

## CHAPTER V

### THE POWERS OF CONGRESS TAXATION AND FINANCE

THE powers of Congress have been the great battle-ground of the Constitution. Around them have surged the legal combats of Strict and Broad Construction, of Tariff and Taxation; of Nullification, of Secession, of the Currency and finally of Commerce Regulation and Corporation Control. Each of these great conflicts has arrayed the statesmen of the time in two opposing schools, one holding that Congress had the constitutional power needed, the other contending that it had not. In each struggle too, there has been some vital interest of the nation at stake and on the answer to the question "Has Congress the power" has hung the decision whether we should go forward or backward. We can now see that the men who contended for a broad interpretation, and who supported the powers of Congress, were fighting for national progress and that their success meant a freer, stronger national government to cope with the problems of the time. It is interesting to see that during this century and a quarter of struggle many foreign nations have adopted federal constitutions, notably Canada, Germany, Switzerland, Australia, South Africa and Mexico, and all of these without exception have conferred upon their federal authorities far more power than ours possessed.

The powers given to Congress in 1787 were those that seemed absolutely necessary to answer the immediate needs of that time.

Taxation, borrowing, and coinage.

Regulation of foreign trade and commerce between the States.

Maintenance of an army and navy.

These were the points at which the Articles of Confederation had broken down. Any new government must control these essential points of sovereignty if it was to be truly national in character and to hold the respect and loyalty of the people. But since that time no new authority over business conditions has been conferred by any amendment of the Constitution and Congress is now struggling to solve our industrial and commercial questions by means of a group of powers that are no longer adequate to the task. As each decade passes it becomes clearer that the Federal authority must be substantially increased.

**Taxation and Finance.**—The taxing power is by general consent the most vital and important of all government prerogatives. Without it no national government can long exist. All the early conflicts between the King and the barons in England centered at

this point, and the rise of English political liberty dates from the time when the Parliament won for itself the right to be consulted in taxation. The first national Douma or Assembly of Russia had been in existence just seven days when it demanded this essential authority from the Czar. Our own Congress, under the Articles of Confederation, had been obliged to rely upon the contributions of the States for its uncertain financial resources; it might levy a tax upon the States but they paid or not as they saw fit. It is not strange that a government without resources of its own could not long command respect. To remedy this weakness it was provided by the new Constitution that Congress should have power "to lay *and collect* taxes, duties, imposts and excises."

The effect of this change was far-reaching. First, it gave the national government an independent source of revenue, yielding abundant funds for all its expenses; the dignity and power of the nation were thereby at once raised to an unquestionable plane. Henceforth it could plan and undertake its administrative duties without fear of bankruptcy or humiliation. Second, it has made possible the protective tariff system by which the national manufacturing industries have been built up and developed. The first Congress under the new Constitution passed in 1789 a tax law with the following preamble: "Whereas, it is necessary for the support of government, for the discharge of the debts of the United States and the encouragement and protection of manufacturers that duties be laid on goods, wares and merchandise imported, Be it enacted, etc."

Third, it has enabled Congress to regulate many industries by means of taxation; for example the manufacture and sale of alcoholic liquors, oleomargarine, etc., have been heavily taxed by Congress in such a way as to control to a large extent the production and use of these articles, and by the Corporation Tax of 1909 the Government has secured information about the finances of all the principal companies operating in the United States.

Under the constitutional taxing power a number of practical questions have arisen:—

What may Congress tax, and what may it not tax?

What may the States tax, and what may they not tax?

**What May Congress Tax?**—Congress may in general tax anything except the State governments and their agents. It may not tax the State governments because by doing so it might seriously interfere with them, and it is the purpose of the Constitution to preserve and protect the States as well as the national government. A good instance of this principle is seen in the case of Tax Collector v. Day, 11 Wallace, 113; 1870. Here the Supreme Court ruled that Congress could not tax the salary of a State official because it might obstruct and hinder the necessary work of the State. Day was a State Judge and the Court declared that a Federal tax upon *his salary would be in effect an interference with the State's judi-*

cial department. If the Federal Government could tax the salary of such officials it might become impossible for the State to carry on its affairs. Each State is supreme in its own sphere and must not be hindered or obstructed by the Federal Government.

A different ruling was made in the case of *Veazie Bank v. Fenno*, 8 Wallace, 533; 1869. Here Congress had taxed the circulating notes of State banks with the apparent purpose of discouraging their circulation, and the question arose,—could Congress interfere in this way with the privileges granted by the State government to its local banks? The Supreme Court decided that Congress had the constitutional authority to do so because the Constitution had granted it not only the taxing power, but also the control over the national currency, and in pursuance of this control Congress had established a national banking system which should issue bank notes. This new national currency authorized by the Constitution must be made supreme in order to displace the currency issued by the State banks. If Congress had the right to issue such currency it had the right to prevent other forms from interfering with it and this it had chosen to do by a heavy tax of 10% on State bank notes. The law was accordingly held to be constitutional under the authority to levy taxes and to provide a national currency.

**Can Congress Tax the Funds of a Municipality?**—In *United States v. The B. & O.*, 17 Wallace, 322; 1873, the railway company had an agreement with the city of Baltimore by which part of the earnings of the company were to be paid to the city, at regular intervals. The Federal Government sought to collect a tax from the entire earnings of the railway and this the company protested, claiming that it need not pay a tax on that part of its funds which were due to the city of Baltimore. The Supreme Court upheld the company and declared this part of its earnings to be exempt from Federal taxation on the ground that a city was an agent of the State government and that the funds of a municipality, no matter where located, were not subject to Federal taxation because by taxing the revenues of a city the Federal Government might embarrass and hinder its operations and to that extent interfere with the State. Accordingly, following the same principle which later guided the decision in *Pollock v. The Farmers' Loan & Trust Company*, 158 U. S. 601; 1895, the tax was declared unconstitutional as applied to such a city fund.

**Can Congress Tax a Business in which a State Engages?**—This problem arose in the South Carolina liquor dispensary system; here the State had prohibited the private sale, either wholesale or retail, of intoxicating liquors within its borders, and had taken up this sale itself by a dispensary system, turning the profits therefrom into the State treasury. Upon the Federal tax collector's attempt to levy the usual internal revenue duty upon sales of intoxicants, the State officials claimed exemption from the tax on the ground that *the State could not be interfered with by the Federal taxing power.*

In the subsequent suit, *South Carolina v. United States*, 199 U. S. 437; 1905, the Supreme Court held that the Federal internal revenue tax on intoxicating liquors was a tax, not upon State governments, but upon an ordinary private business, and that even if a State chose to engage in this business, the levy of a tax was not upon the State but upon the business. Such a levy must be regarded not as an interference with the State government but as an ordinary revenue measure to which the State authorities subject themselves when they engage in the industry. The tax could therefore constitutionally be applied to the dispensary system managed by South Carolina.

**Can Congress Tax a State or City Bond?**—In 1804 Congress had levied a tax on incomes, including the income or interest from city bonds. The owner of such a bond claimed that the law was unconstitutional because it interfered with the borrowing power of the city, and the city was a part of the State government. This claim brought up for decision in the Supreme Court the case of *Pollock v. The Farmers' Loan & Trust Co.*, 158 U. S. 601; 1895, in which the Court held the Federal income tax to be unconstitutional. The city as part of the State government was obliged to borrow money in order to carry out its powers. It did this by selling bonds. If its borrowing power could be interfered with by the Federal Government in any way the city would be prevented from transacting the business confided to it by the State and from performing its duties. This would be an interference with the State powers by the Federal taxing power and therefore contrary to the purpose of the Constitution. The Federal tax on the interest on municipal bonds was, in substance, a tax on the bonds themselves, and this was a tax on the State government's power to borrow. Hence the Act was unconstitutional. The reasoning here, on broad lines, is the same as in *Collector v. Day*, 11 Wallace, 113; 1870. The national government like the State governments, is supreme *in its sphere*. Congress must therefore not reach out over into the sphere of the States and use its taxing power to hinder them in any way.

From these rulings it is clear that all the necessary and proper means by which the State carries out its duties are free from taxation by Congress. With this exception, however, Congress may tax all the property of the people. It is even possible that the national government and the States may tax the same property.

**Express Constitutional Limits:**—But the Constitution imposes certain limits and restrictions upon the way in which national taxes may be levied; all of these were intended to secure fair treatment for all the States and complete freedom of trade among them.

(a) *Direct taxes*, except those on incomes, must be levied among the States in proportion to population. (Article 1, Section 9; and the 16th Amendment.)

(b) *Indirect taxes must be uniform throughout the United States.* (Article 1, Section 8, Clause 1.)

(c) No tax shall be laid on articles exported from any State. (Article 1, Section 9, Clause 5.)

(d) No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another. (Article 1, Section 9, Clause 6.)

All of the above restrictions apply only to Federal or national taxes. (a) The rule requiring direct taxes to be levied according to the population of the various States has caused great difficulty. What is a direct tax? The answer to this question has changed greatly in the recent history of our government. In the case of *Hylton v. United States*, 3 Dallas, 171, the Supreme Court decided that a carriage tax was not a direct tax. In *Springer v. The United States*, 102 U. S. 586, the Court declared that "direct tax" includes only capitation or head taxes and land taxes, these being the forms of direct taxation accepted as such at the adoption of the Constitution. But in *Pollock v. The Farmers' Loan Company* (re-hearing 158 U. S. 601, decided in 1895) the Court reasoned that the national income tax levied by the Act of 1894 was direct. That part of the tax which was laid on the rents from real estate must necessarily be direct because there was no substantial difference between a tax on land and a tax on the rents from land. Since land taxes were admittedly direct, taxes on rents from land must also be direct. Next arose the question, is a tax on income from personal property, including invested funds, etc. also, direct? The Court decided that it was. Congress had never attempted to lay a direct tax in precisely this form but that did not prove that Congress could not do so. The words, "direct tax" should be interpreted in their plainer meaning, and from this standpoint, the Court ruled that a direct tax included taxes on the income from personal property. On these grounds the income tax of 1894 was direct and it therefore should have been apportioned according to the population of the various States; *as it was not apportioned* in this way as required by Article I, Section 9, Clause 4, of the Constitution, the law was unconstitutional. Since by this ruling the income tax for the first time became a direct tax, we then had the following classes of levies which the Court considered direct:

Capitation, or so much per head of the population.

Levies on land or on the rent of land.

General income taxes.

The decision also made it difficult if not impossible for Congress to levy any income tax upon an equitable basis. The amount of income in the various States is not in proportion to the population; therefore, a tax which must be raised according to the numbers of people rather than according to the amount of income in each State, would be an unequal burden upon the respective States.

**The Sixteenth Amendment and the New Income Tax.**—The *Pollock* decision having repealed the income tax law of 1894, an agita-

tion immediately arose for a change in the Constitution and eighteen years later, in 1913, the required three-fourths of the State legislatures ratified an amendment providing that "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment, among the several States, and without regard to any census or enumeration." Pursuant to this Amendment Section II of the Tariff Act of October 3, 1913, provided for an income tax of 1% on all incomes over \$3,000, and an additional tax on incomes of \$20,000 and over. This additional tax was calculated as follows:

between	20,000 and	50,000	.....	1%
	50,000	75,000	.....	2%
	75,000	100,000	.....	3%
	100,000	250,000	.....	4%
	250,000	500,000	.....	5%
above	500,000		.....	6%

In all cases both the normal tax and the additional tax are laid only on the surplus above the figures mentioned. For example, an income of \$3,700 would pay 1% on \$700; an income of \$25,000 would pay 1% on \$22,000, plus 1% on \$5,000. A married man living with his wife is entitled to an additional exemption of \$1,000.

Returns are made by all taxable persons on the first day of March of each year and are paid on or before June 30. In this tax, the law adopts the principle of "collection at the source," by which the tax on the rent, or profits or mortgage interest, or similar income, is deducted by the agent, or company, paying it and transmitted to the collector of internal revenue. Appeals from the decision of the local district collectors of internal revenue may be made to the Commissioner of Internal Revenue at Washington. Corporations, companies, and associations pay a tax on their net income also; and, in order to avoid double taxation, their shareholders are exempted from paying any tax on the dividends from such companies.

In order to ascertain net income, the following deductions are made from gross income:—First, the ordinary necessary expenses in maintenance and operation of business, second, the losses actually sustained within the year and not compensated by insurance; this includes a reasonable allowance for depreciation and wear and tear, third, interest on indebtedness of the company, fourth, taxes. Each taxable person or company makes a return to the collector. Assessments are based upon these returns and further upon the additional information which the collector in any district may consider necessary to secure, in case there is reason to believe that a false statement has been made. The assessments of corporations are filed in the office of the Commissioner of Internal Revenue and constitute public records, *but are open to inspection only upon the order of the President.* The purpose of this provision is to enable the govern-



ment and other authorities to secure accurate information as to corporate finances and conditions. Collectors and deputy collectors, agents and clerks, and other employés of the government are forbidden to divulge or make known to persons not concerned, the operations, apparatus, methods of work, etc., of any manufacturer, or the sources of income, profits, losses, and expenditures of any person, or corporation, or to permit any income return or copy thereof to be seen by any person except as provided by law. The provisions of the income tax law governing corporations and companies supersede those of the corporation tax.

**The Constitutionality of the Corporation Tax.**—Meanwhile the corporation tax had been ruled on by the Supreme Court in *Flint v. Stone Tracy Co.*, 220 U. S. 611, 1911; here Congress had levied an excise tax on the corporate method of transacting business, the tax to be measured by the net income of the corporation. The taxpayer claimed that the levy was, in substance, an income tax and under the previous ruling in the Pollock case, an income tax being direct, must be apportioned among the States according to population, whereas Congress had failed to apportion the corporation tax according to the population of each State. He therefore contended that the corporation tax was direct and not apportioned and hence unconstitutional. The Supreme Court, however, held that the tax was not an income or direct tax, but rather a levy upon a peculiar form of organization, to wit, the corporation, and that Congress, wishing to tax the peculiar advantages arising from this form of doing business, was in substance not levying a direct but an indirect excise tax. If so, such a tax, being indirect, need not be apportioned according to population. The tax was accordingly held to be valid and now nets the Federal Government about \$30,000,000 yearly. In its new form as a part of the direct income tax it is also constitutional because of the 16th Amendment.

(b) Indirect taxes "must be uniform throughout the United States." By uniformity is not meant the same rate on all goods but the same rate on the same goods *throughout the country*,—i. e., territorial uniformity. The "United States" however, means, not a distant territory or possession of the nation, but only that part of the country which is located on the mainland; so for example a tax may be levied in Porto Rico, the Philippines, or Hawaii, with a different rate from that levied on the mainland in California or Pennsylvania. This question arose after the Spanish War in connection with the new territories, and it was decided that the term "throughout the United States" did not apply to territories or distant dependencies, but meant throughout the States.<sup>1</sup>

<sup>1</sup> In *Downes v. Bidwell*, 182 U. S. 244; 1900, this question came up in the form of a duty paid, under protest, by Downes, the owner, upon certain oranges consigned to him in New York from Porto Rico. Under the act of 1900, creating a government for Porto Rico, Congress had provided that goods shipped from Porto Rico into the United States should pay 15% of the foreign customs duty to be collected on imports into the United States. Downes objected to the

Whatever the soundness of the legal reasons for such a decision may be, the decision itself is of the greatest practical benefit in the administration of our colonial possessions; it leaves Congress free to deal with each dependency according to the special conditions existing there.

(c) The reason for prohibiting taxes on articles exported from any State is to prevent the destruction of the foreign trade of the States and also to avoid possible discrimination. The colonies had suffered severely from attempts made by Parliament and the Crown to suppress their exports and it was desired to make such oppressive measures impossible. Here again the territories and dependencies are not included, and an export tax may be levied for example on articles leaving the Philippines.

(d) In declaring that no preference should be given to the ports of one State over those of another, the Constitution aimed to prevent discrimination by means of administrative rules and port regulations as well as by general legislation. In 1787 the States did not trust each other to the same extent that they now would, hence their efforts to exclude all opportunity for unequal regulation and favoritism. The rule does not apply to territories or dependencies, but only to ports of the States. Furthermore, the coastwise trade from one port to another must be free of taxation. It was to establish this freedom from State taxes that the new Constitution was proposed as far back as 1785. To protect this interstate trade from burdensome Federal taxes it was provided that the national government should not compel vessels engaged in such trade to pay duties when passing from one State to another. This clause together with the prohibition of export taxes and of State taxes on imports and exports insures the complete freedom of trade between the States.

**The State Taxing Power.**—The States in their turn have also found their taxing powers limited by the Constitution. In general they may tax anything except

tax, claiming that Porto Rico was a part of the United States in the sense of Article I, Section 8, providing that "all duties, imposts and excises shall be uniform throughout the United States." The Court held that this part of the Constitution, together with the clauses forbidding preferences between ports of different States and forbidding taxes on articles exported from a State, were all originally placed together in drafting the Constitution but were later separated in arranging the document for the purpose of style. Their object was identical and their intention is clearly to prevent Federal discriminations between the States as States, and not to apply to other territory outside the States which would be subject to the regulation of Congress. "Throughout the United States" therefore meant and still means throughout the States and does not include the territories or dependencies. Accordingly, Congress has the power to tax the dependencies as it sees fit.

"We are therefore of opinion that the Island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker Act is constitutional, so far as it imposes duties upon imports from such island, and that the plaintiff cannot recover back the duties exacted in this case."

interstate commerce,  
imports and exports,  
the tonnage of ships entering their ports,  
and the agencies of the national government.<sup>1</sup>

Tonnage taxes and import and export duties are expressly prohibited in the Constitution (Article I, Section 10) but the prohibition of a tax on agencies of the Federal Government while not expressly mentioned in the Constitution, is implied by the nature of the government itself. This prohibition was first declared by Chief Justice Marshall in the celebrated case of *McCulloch v. Maryland*, 4 Wheaton, 316; 1819; in which a State tax upon the notes of the United States Bank was declared unconstitutional. It was held that the United States Bank had been chartered by Congress as a means of carrying out certain national powers; it was therefore an agency of the national government. If the State of Maryland could tax such an agency, it might by excessive taxation prevent the national government from exercising its powers within the State boundaries. Said the Chief Justice, "the power to tax involves the power to destroy." If Maryland could tax the United States government all the other States could do the same and the government could be taxed out of existence. Such was clearly not the intention of the framers of the Constitution, hence a State tax on the national government agencies of any kind is unconstitutional. The ruling in this case corresponds with the Federal tax case of *Collector v. Day*, 11 Wallace, 113; 1870, already mentioned.

With these exceptions, the State is free to levy on whatever it chooses, but it may not tax so heavily as to confiscate property, nor may it single out special kinds of property for unusual taxation in such a way as to amount to discrimination and thereby deprive persons of the equal protection of the laws, as guaranteed in the 14th Amendment. These questions of State taxation have become much more important in recent years; a more complete explanation of the principles involved and of their application to private business is given in the Chapter on Constitutional Protections of Business.

**The General Welfare Clause.**—In two parts of the Constitution the expression "general welfare" is used,—the preamble states that one of the purposes of the new government is to "promote the general welfare," and Section 8 of Article I gives to Congress the power to tax "to provide for the common defense and general welfare of the United States." These general phrases have been more widely misunderstood than any other part of the instrument, although their meaning is clear upon a moment's reflection. They have wrongly been supposed to confer on Congress a *separate* and

<sup>1</sup> For inspection purposes such as quarantine, etc. they may levy a tax on imports or exports to an amount sufficient to pay the cost of the quarantine or inspection, but any surplus of the taxes over and above this amount must be paid into the national treasury, Article I, Section 10.

*distinct* power,—that of promoting the general welfare. If Congress could promote the general welfare in addition to its other powers, there would be practically no limits to its authority. It might establish schools, regulate marriage and divorce, change the laws of contract and govern manufacturing and farming conditions; but all these subjects are in reality regulated only by the States, not by Congress. What is the true meaning of this clause? The words “general welfare” explain the *purpose of taxation*. Congress may tax in order to provide for the general welfare. This is readily seen from the other purposes of taxation given in the same clause,—“to pay the debts and provide for the common defense.” The whole bearing of the phrase “general welfare” becomes clear if we insert the words “in order to,”—Congress has power to tax in order to pay the debts, and in order to provide for the common defense and the general welfare of the United States. When therefore we see it stated that a power of Congress, other than taxation, is derived solely from the “general welfare” clause, we may know immediately that such a power does not exist.

**Regulation of Business by the Taxing Power.**—The taxing power is usually construed in a broad free spirit by the courts, and Congress is given the benefit of the doubt in disputed questions of constitutionality. This has enabled the Federal Government to use its taxing authority to regulate in many ways that would otherwise be illegal. For example, by the acts of 1886 and 1902 Congress laid a tax of 10 cents per pound upon artificially colored oleomargarine. The law was passed on the urgent insistence of the farming interests, which naturally sought to prevent the manufacture and sale of imitations of butter. This at once raised the question, can Congress do, by the taxing power, what it has no other constitutional authority to attempt, that is, to discourage the manufacture and sale of any article? If Congress has no authority over manufactures nor even intrastate sales, how can it use taxation as an indirect means to accomplish this end? In the leading case on this point a licensed dealer in oleomargarine, McCray, had purchased for the purpose of re-selling, a 50-lb. package of oleomargarine artificially colored to resemble butter, upon which internal revenue duties of only  $\frac{1}{4}$ c per lb. had been paid. When prosecuted for failure to pay the full 10c tax he claimed that the latter was unconstitutional because it was an attempt to discourage the production and sale of oleomargarine, which as a purpose was unconstitutional, since it was a regulation of manufactures. But the Supreme Court (*McCray v. U. S.*, 195 U. S. 27; 1904) refused to see in the law any attempt to regulate, and held that the levy was well within the taxing powers of Congress; “the judiciary cannot restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted. Therefore we find no merit in the argument that the purpose of Congress in levying this tax was to suppress the manufacture of oleo and not

to raise revenue." The Court ruled that the laws mentioned were in the nature of an excise tax and Congress undoubtedly has the power to levy excises so long as they are made uniform throughout the United States. It was within the authority of Congress to select the objects on which the excise should be laid. McCray had further claimed that the 10c per lb. tax was so heavy as to destroy the business and thereby "deprive him of his property without due process of law," contrary to the 5th Amendment. This also the Court overruled, declaring that if the power to levy excises was constitutional, as was clear, then the fact that a business or product which was heavily taxed necessarily suffered some disadvantage, did not render the tax unconstitutional. This case is a fair illustration of the many decisions which have upheld and strengthened the power and free discretion of Congress in regulative tax laws.

**Double Taxation.**—Since both Congress and the States may tax the citizen's property, there is a possibility of double taxation. The Constitution does not forbid this, but both national and State authorities have seen the wisdom of avoiding it as far as possible. By tacit arrangement they have divided their systems of taxation according to the following plan: Congress taxes imports and certain articles of luxury, such as tobacco, malt and spirituous liquors, playing cards, etc., also a number of products the use of which is frowned on by public opinion, such as adulterated butter, mixed flour, filled cheese, oleomargarine, etc. The States on their side tax real estate and personal property, and until 1909 they enjoyed the entire field of taxation on corporations, but in that year the Federal corporation tax was enacted, marking a departure from the general line of division of taxable property between the two governments. It was followed in 1913 by the income tax.

While this separate distribution of the sources of revenue between State and Nation has been in the main a highly satisfactory one, it seems doubtful if it can continue for any length of time. The ever-growing demands that the Federal Government depart from its former narrow field, are now so insistent and strong that the States must apparently soon give up their exclusive control over the taxation of real estate and personalty. The reasons for this are deeply significant of the distinctly social trend of public opinion which has been slowly forming in the United States. The American people are no longer interested solely in finding the easiest means of securing the most revenue for the government; they are now devoting more attention to those taxes which will shift the weight of government expense to the wealth of the country.

**Social Use of the Taxing Power.**—The one thought which runs through the proposed inheritance tax, the income tax, the corporation tax, and all the newer forms of levy is that the chief burden of taxation should be lifted from the poorer classes and made to rest upon the holders of securities, those who have incomes above a certain figure, and those who inherit property. As this social

method of taxation comes more into the foreground in the national government, Congress is obliged to put aside the old division between State and national sources of revenue and to reach over into the field formerly occupied alone by the States. Two other forces are also influencing Congress to seek new forms of property for taxation, viz.—the gradual reduction of the tariff and the spread of prohibition sentiment among the central and western States. The final effect of a lowering of the tariff is to reduce the receipts from that source. As the anti-liquor sentiment grows in strength, the government receipts from internal revenue must also fall off. The government now gets nearly one-fourth of its total revenue from alcoholic liquors. Looking ahead only a few years we must therefore be prepared to derive an increasing part of our national revenues from other forms of taxation. The liberal and radical sentiment of the time is determining the direction in which these new taxes must lie. The high cost of living has only served to strengthen this sentiment and to accelerate the change. The steady drift of public opinion towards graded taxation, that is, towards levies which fall with a higher percentage upon the well-to-do, is in the main a progressive tendency but we must remember that every "graded" tax should if possible be collected, if only to a trifling amount, from the lower incomes also. Every citizen should have an interest in the government and with that interest he should have the sense of responsibility that goes with bearing his share in its cost. The growth of a great mass of voters who had lost this sense of responsibility would be a calamity. The business exploitation and price extortions practiced by privileged combines and cliques have tempted us in this direction but we cannot achieve progress by exempting the poorer voter from all taxation; rather must we bring to both rich and poor alike a keen sense of the matchless service that our government can perform if it is properly supported and financed by all classes, and is in this real sense a government of all the people.

**National Finances.**—The magnitude of the national budget, the sources of revenue and the general uses to which the public funds are put may be seen from the following:

## SUMMARY OF NATIONAL FINANCES, 1914

Total receipts from Customs.....	\$292,320,000
"    "    "    Internal revenue.....	\$380,041,000
Net    "    "    Postal Service.....	\$  4,376,000
Miscellaneous.....	\$ 62,311,000
Total Receipts.....	\$739,050,000
Total expenditures for Civil Establishment.....	\$170,530,000
"    "    "    Army and Public Works.....	\$173,522,000
"    "    "    Navy.....	\$139,682,000
"    "    "    Pensions.....	\$173,440,000
"    "    "    Indian Service.....	\$ 20,215,000
Interest on Debt.....	\$ 22,863,000
Total Expenditures.....	\$700,254,000

Cost of collecting customs for fiscal year ending June 30, 1914.....	.035 cents per dollar of revenue collected, or 3.3%
Cost of collecting internal revenue for fiscal year ending June 30, 1913.....	.0152 " " "
of revenue collected, or 1.5%	

## OUTSTANDING AMOUNT OF BONDS

Consols of 1930, 2%.....	\$646,250,150
Loan of 1908-1918, 3%.....	63,945,460
Loan of 1925, 4%.....	118,489,900
Postal Savings Bonds, 2½%.....	4,635,000
Panama Canal Bonds, 2%.....	84,631,980
" " " 3%.....	50,000,000
Total interest bearing debt.....	\$967,953,000
Non-interest bearing debt.....	\$368,729,000

Outstanding currency notes partly covered by deposits in the

Treasury.....	\$1,574,000,000
Total Debt.....	\$2,912,000,000

**Collection of Taxes.**—This work is entrusted to two main agencies of the Treasury Department—the Division of Customs and the Collector of Internal Revenue. The Customs Division has jurisdiction over taxes on articles imported into the United States from abroad. Under this division are the 49 customs districts with the main ports of entry on the coasts of the United States and on the northern and southern boundaries. At each of these is a collector or deputy collector of customs with various deputies, surveyors, weighers, etc. Each customs district is divided into a number of inspection districts, including the various piers, wharves and stations within the district. There are also numerous bonded warehouses under the supervision of the collector of the port, for the purpose of storing goods before duty is paid. The deputy collector of customs having examined the goods imported and announced the tax which is due, the importer may appeal from his decision to that of the collector of the port and, should the decision of the latter be adverse, the importer may again appeal to the Secretary of the Treasury, and finally to the United States Board of General Appraisers, a body composed of ex-officio members appointed from the Treasury Department, who are technical experts especially qualified to interpret the law. Should any questions as to the *legality* of the decision of the latter arise, such question may be brought in the United States Customs Court created by the Act of 1909, but in matters of executive *discretion* the judgment of the Board is final.

The amount of import duties collected in the course of a year varies widely according to our prosperity, but the receipts from this item always form a chief source of Federal revenue, as appears in the statement already given above.

*Until 1913 there was some waste in the collection of customs owing to the political pressure brought to bear on Congress and*

the President to keep in existence ports of entry which did not pay expenses, in order to provide political positions for partisan workers. In 1912 Congress authorized the President to reorganize the customs service with a view to cutting down the total cost of collections by at least \$350,000. This reorganization he completed by his order of March 3, 1913. The order abolishes all the independent sub-ports except those which are needed, that is, which will at least pay expenses; it rearranges the salaries of collectors and surveyors, deputies, etc.; abolishes unnecessary positions and does away with the former system of paying officials in part by fees; all surveys of customs except those at the seven principal sea-ports are abolished. A great saving is effected in this way and the whole organization is made more flexible and responsive to the instructions and arrangements of the Secretary of the Treasury. The invoices of goods shipped into the United States must be sworn to as correct in valuation, by the importers, but there is a constant tendency to undervalue cargoes in order to escape taxation.<sup>1</sup> Smuggling is prevented chiefly by the revenue cutter service and the secret service divisions. The cutters patrol the coast and seek to prevent the clandestine landing of goods outside of the regular customs ports; they also watch the lightering of vessels at anchor.

The Commissioner of Internal Revenue has for his province the collection of the heavy taxes imposed by Congress upon the manufacture and sale of oleomargarine, "renovated" butter, flour mixed with adulterants, "filled" or adulterated cheese, the duties upon tobacco products and distilled spirits and fermented liquors, playing cards and the income tax. The area of the United States is divided into sixty-four collection districts, with a collector and deputies in each. The internal tax is collected chiefly by the sale of stamps which must be placed upon each original package of the article as manufactured. These stamps are then required to be cancelled, that is, marked or defaced in such a way as to prevent their being used again. Simple as this administration appears, the utmost attention and vigilance of the authorities are required to prevent violation of the law. This is particularly the case in the manufacture of distilled spirits where the tax is so high as to make successful evasion extremely profitable. The results of our "luxury taxes" are interesting: For the fiscal year 1914 the receipts from whiskey and brandy, etc., were.....

from malt liquors.....	\$159,000,000
" tobacco.....	67,000,000
" playing cards.....	79,000,000
" oleomargarine.....	714,000
	1,325,000

The total from beverages was \$226,000,000.

<sup>1</sup> Another difficulty is presented in the interpretation of the tariff law regarding drawbacks. A drawback is a refund of the duty on foreign goods which are not consumed in the country but are imported as raw stuffs, manufactured and exported again for sale abroad. The idea is to stimulate our industries by giving them the advantage of cheap raw materials.



There were 194,000 saloons in the country and 6,452 wholesale liquor dealers. The number of both saloons and wholesalers shows a marked decrease from year to year, although the amount of liquors consumed increases slowly.

The Commissioner's office is composed of the following divisions whose names indicate their functions: Appointments, Law (suits over forfeitures, seizures, etc.), Claims, Tobacco, Distilled Spirits, Accounts, Stamps, Assessments, Revenue Agents, Chemistry, Miscellaneous.

From this short description it is clear that our Federal revenue system is based chiefly upon indirect taxes. Although we have thereby escaped some of the dishonesty and corruption which are associated with direct levies yet in our high customs duties and spirits taxes we have a difficult administrative problem. Smuggling and illicit distilling on an extensive scale are of constant recurrence. The new income tax is now also collected by the Commissioner of Internal Revenue.

The Audit of the receipts and expenditures of government departments has existed for centuries in all civilized nations, but has been most highly developed by the French, from which nation most of our present ideas and terms in public auditing have been borrowed. The method, briefly stated, is to provide an examination of the accounts of all receiving and disbursing officers by an independent authority and thereby place a check upon inaccurate or dishonest payments of public moneys. The task involved is a huge one as nearly every bureau, office or division in the government service has its disbursing officer, that is, an employé authorized to pay out funds for the office. The administrative machinery which has been organized to audit all these accounts, is under the direction of the Comptroller of the Treasury, who is appointed by the President with the approval of the Senate. This official acts as a court of appeal from decisions of the various Auditors, who are his subordinates. Of these latter there are six, one each for the Treasury, War, Interior, Navy and Post Office Departments and one for the State and remaining departments and offices. Each of these Auditors, with his deputies, is charged with the examination and approval of all accounts of the department to which he is assigned. An example showing the character of the work of these officials may be seen in the important Bureau of the Auditor of the Post Office Department. The Auditor or one of his two deputies countersigns all warrants drawn upon the Treasury by postal officials, superintends the collection of debts and penalties due the Post Office Department, has custody of all contracts made by the Department and conducts its suits through agents of the Department of Justice. His Bureau is subdivided into seven divisions dealing with the following subjects: Bookkeeping, Collecting, Pay, Inspection, Assorting and Checking (for money-orders), Recording and Foreign (money-orders and accounts). The Comptroller is

obliged to see that expenditures are only made for the purposes authorized by law and not exceeding the amounts appropriated by Congress. He and the Auditors are required to furnish a bond for the faithful discharge of their duties.

The annual running expenses of the executive departments are estimated in advance and these estimates are sent to Congress and considered by the various committees dealing with the subjects affected. The various bureau chiefs are invited to explain the needs of their offices before these committees, particularly before the committee on appropriations, and the estimates are then modified or approved in their original amount. They are then embodied in a general appropriation bill and finally passed by the House and Senate in the same way as other laws. The watchfulness of the Congressional committees is very great and any increase in executive expense usually requires full explanation. In case unusual expenditures have proven necessary, over and above the amount granted by Congress, the money for this purpose is appropriated in an "Urgent Deficiency Bill" which is usually given precedence over other measures in the legislative bodies. In this way the Congressional power is made an important check upon the expenditures of the Executive. This custom, which arose in England during the later struggles between crown and people, has been copied by all modern governments.

In England and in European countries, too, the entire revenue of the government is provided for in one tax bill, while all the appropriations are grouped in a supply bill and these two are then finally adopted as "the budget." President Taft made the first effort to introduce some order in the chaos of our national finances; he appointed a Committee on Efficiency and Economy, under the direction of Dr. F. A. Cleveland, an eminent authority on government economy and accounting. This body, which has been continued under President Wilson, has made a thorough study of the accounting and business methods of the executive departments and prepared a series of recommendations which would greatly increase the effectiveness of the administration and save over a hundred million dollars yearly in expense. Among its strongest suggestions is that of a budget which would bring together all items of expense and revenue, of assets and liabilities, and enable the national legislature to give an intelligent decision on the recommendations of the Executive. Astounding as it seems, Congress has to-day no accurate knowledge of the work of the departments nor of the basis on which to figure their costs. Often the administrative heads themselves are unable to judge of the relative efficiency and extravagance or economy of the departments' work, as compared with similar work done in private establishments. A modern budget system with more definite standards of efficiency would speedily remedy this situation.

*The Secret Service.*—This division of the Treasury Department

is intended to prevent and detect violations of the tax and coinage laws such as counterfeiting, smuggling, moon-shining, or the secret manufacture of spirituous liquors without payment of the internal revenue tax; the evasion of the tobacco tax laws, etc. For these purposes the country is divided into twenty-five districts with local headquarters in each, and numerous agents or "operatives" are stationed in European cities to detect smuggling into American ports. The Division has also been used to aid other departments of the government when this has seemed advantageous, and in doing so it has performed some meritorious services. The extensive Western land frauds which reached the magnitude of a national scandal were unearthed in 1905 and 1906 by division agents, and were found to involve politicians of national prominence. Among these were members of both Senate and House, and in spite of strong influence they were convicted through evidence obtained by division operatives. The two Houses, shortly before this time, had reached what we may hope was the lowest ebb of political and moral standing. They retaliated by placing a clause in the appropriation bill for the Treasury Department, which provided that the Secret Service should not be devoted to other purposes than the discovery and punishment of frauds in the tax and coinage bureaus. This has been a serious hindrance to the detection of crime and the Secretary of the Treasury has repeatedly recommended its repeal. For example, among the many duties which the Secret Service operatives, and they alone, can well perform, are the protection of the President and the President-elect. From the time of the successful candidate's election up to his inauguration, he is in no legal sense an official of the United States government, yet, following the usual custom, operatives from the division are detailed to protect him, regardless of the failure of Congress to provide for this wise and necessary precaution. The fear entertained by many members of the national legislature that a system of espionage may be undertaken by the Federal Executive on a larger plan, would seem to be groundless. The funds provided by Congress for the detection of crime and its punishment are unfortunately all too meagre to enable the President to carry out the laws effectively, while a Russian or German system of spies is utterly impossible. In a very real sense it is also true that violations of the law on an extensive scale multiply as the yearly appropriation for detection and prosecution becomes inadequate. For these reasons a material increase in the funds and staff of the bureau are needed.

**Coinage.**—The power to "coin money, regulate the value thereof, and of foreign coin," has played a prominent rôle in our history. On two occasions it has been closely connected with serious national crises, political and economic. The first arose in the Civil War when the government had exhausted its borrowing power; it had issued bonds to such a large extent that there were no further purchasers for them. Both in this country and abroad it became *impossible to float such issues*. The banks of the Eastern cities had

lent money to meet the Government needs until several financial institutions became insolvent. In this way, at the outset of the Civil War the nation was confronted by an empty treasury, while immense sums of money were required to finance its military operations for the preservation of the Union. Unless these funds could be secured the dissolution of the nation was inevitable. In desperate straits the government turned to paper money. Such money was in substance a promissory note issued by the government.

Congress in 1862 issued several million dollars of these notes and made them legal tender, that is, required them to be accepted when offered in payment of any debt. It is safe to say that without such an issue of paper money, it would have been impossible to conduct the war.<sup>1</sup> But was the issue constitutional? This question arose soon afterward and at first the Supreme Court in the case of *Hepburn v. Griswold*, 8 Wallace, 603, 1869, decided that Congress did not have the constitutional authority to issue paper money. The expression "coin money" meant to stamp strips or pieces of metal, the Court declared, and this could not be held to include paper money. But later, in the *Legal Tender Cases*, 12 Wallace, 457, 1884, and in *Julliard v. Greenman*, 110 U. S. 421; 1883, the Supreme Court, which had meanwhile been increased from seven to nine members, ruled that Congress could issue paper money under the power to coin money, to borrow money and under the war power. The Court in these decisions held that the printing of paper money and the compulsory acceptance of this money was one of the most common and usual forms of borrowing as practiced by all modern governments and the Constitution had expressly conferred the power to borrow. Furthermore while the coinage power alone might not be sufficient authority to issue the notes, yet the coinage clause when taken together with the clearly granted power of carrying on a war and the authority to borrow, all combined, undoubtedly gave to Congress the necessary constitutional right to issue paper money as a legal tender. By these decisions the enormous paper currency of the Civil War was legalized; in 1879 the Government was able to resume payment of coin in redeeming the legal tender notes, and the crisis was safely passed.

The second occasion on which the use of the coinage power led to a serious disturbance of conditions was in 1892, when the value of silver sank to one-half of its former level, but the Treasury was still obliged by law to purchase silver for coinage at the old ratio. The compulsory purchase clause of the law was thereupon repealed but the advocates of silver then started an agitation for the coinage of unlimited quantities of that metal at the old rate which was nearly double its real worth. The effect of this proposal if adopted

<sup>1</sup> Some writers, notably Henry C. Adams, consider that a property tax levied by the Federal Government at the outset of the war and gradually increased in extent and volume would have returned abundant revenue to carry on the struggle, and rendered the issue of greenbacks unnecessary.

would have been to flood the country with a debased currency of only one-half its face value. The delay in repealing the silver purchase clause and the agitation for free, unlimited coinage of silver were so disturbing that the business of the entire country became unsettled, and a severe panic set in, which did not pass until 1896, when by the election of President McKinley, the question was settled in favor of the gold standard currency. Silver coinage is now limited in amount and must be kept at a parity with gold.

**The Currency.**—The national currency is composed of gold, silver, Government notes and the notes issued by national banks under the authority of the Federal laws. To secure the value of these national bank notes an executive official, the Comptroller of the Currency, is appointed by the President with the approval of the Senate. This official has sweeping powers over all banks chartered under the national laws. He is authorized to inspect such banks through his agents, to require regular reports as to their financial condition, to compel all persons desiring to secure national bank charters to conform to the necessary qualifications as to number of incorporators, amount of capital, reserve, etc.; he also prepares and furnishes to the banks the notes which they are authorized to issue, requires them to deposit with the Treasurer of the United States securities covering the value of such notes, as a protection for note-holders, and, in case any national bank becomes insolvent, it is the Comptroller's duty to take charge of its property and assets and to dispose of them in such a way as to protect note-holders, depositors and creditors. A redemption agency is also established under the Treasurer of the United States, where holders of national bank notes may present the same for redemption in legal tender. This system has worked fairly well except in times of great money stringency or panic, when it has not been sufficiently elastic to supply the notes which were needed.

The banks have always preferred to lend on quick security, that is, on collateral such as stocks and bonds, which could be sold at a moment's notice to provide funds to cover the loan. Because of this preference, persons who wish to engage in stock speculations have always found it easier to secure loans than have the manufacturers, storekeepers and other business men who needed bank loans for the regular management of their business. In the competition for credit between the speculator and business man, the latter has usually suffered from this handicap because his note, when handed to the bank as collateral for a loan, is not so good nor so quick an asset as the share of stock deposited by the speculator. Accordingly notes, or as they are called, commercial paper, which after all is the most legitimate security for a bank loan and the one which should be most encouraged, has been at a decided disadvantage, while the credit of the country has been drafted off into stock gambling in an unhealthy and injurious way.

*Again the lack of co-operation between the banks in times of*

panic has so weakened them in times of serious crisis that there has always been danger of a succession of bank failures; in order to prevent this, it has been necessary in moments of panic to throw the financial resources of the country largely under the control of a few trusted leaders, allowing them to lend to the threatened banks unlimited amounts in order to restore credit and public confidence. This was done in the panic of 1907 when Mr. J. Pierpont Morgan became, for a few weeks, the absolute dictator of the whole credit of the business world. In short we have been obliged to give to a private individual the power which the government and the banks themselves should provide; viz., a central reserve to be called on in time of emergency, and devoted to those needs which are most urgent to avert a panic. The impression created by the panic of 1907 was so profound that at its close a law was enacted known as the Aldrich-Vreeland Act of 1908, providing for reserve associations to be formed by the banks. This bill was admittedly a temporary makeshift, and in December, 1913, a comprehensive act revising the entire system was passed. Under this act the United States is divided into twelve reserve districts and in each district the National banks form a new Federal reserve bank with a capital of at least \$4,000,000. The stock of this reserve bank is subscribed to by the National and State banks in the district and if the subscriptions are not sufficient, the public and the National government may buy the remaining shares. Each reserve bank is governed by its own board of directors who are chosen partly by the subscribing banks and partly by the central authority which supervises the entire Federal system, and which is known as the Federal Reserve Board. The public funds in the National treasury may be deposited with these reserve banks and they are also to act as the fiscal agents of the National government. They further become reserve depositories for the subscribing banks in each district, that is, the local banks must keep a certain proportion of their deposits on reserve with the reserve bank. The chief business of reserve institutions is the re-discounting of commercial paper. Any subscribing bank which has made loans to manufacturers, merchants, farmers or other business men upon promissory notes ("commercial paper"), if it needs more funds to lend to its clients, may take this commercial paper to the reserve bank of its district and secure a loan upon depositing the paper as security. The local bank thereby relieves itself from the pinch of tight money, yet it may not secure funds in this way from the reserve institution on stocks or bonds as collateral but only on commercial paper. The rate of re-discount charged by the district bank is fixed by the Federal Reserve Board. This Board is composed of the Comptroller of the Currency and the Secretary of the Treasury ex-officio, plus five members appointed by the President with the consent of the Senate. *These latter five members receive a salary for their duties. The Board has extensive authority to watch over and regulate*

quickly every feature of the new system. It directs the accounts and reports of the reserve banks, publishes a weekly statement, controls the issue and retirement of special Federal reserve notes when these are needed, changes the local reserve requirements fixed by law, for both the local and the reserve banks and determines the number and location of reserve districts. It may also remove officers or directors of the reserve banks for causes connected with their official duties. It co-operates with the Federal advisory council, which is a loose, general committee of inspectors or supervisors chosen by the directors of the various reserve banks. The council is designed to furnish an outside, impartial view of the operation of the banking system and to lead to improvements by legislation and executive orders.

The national bank notes are to be gradually retired and their place taken by the notes of the district reserve banks. These notes will be issued on the collateral of commercial paper deposited by the subscribing banks and other security that may be accepted in the discretion of the Federal Reserve Board. The profits of the reserve banks are divided between the subscribing institutions, after a suitable allowance for a surplus fund and Federal tax have been made. The reserve banks are allowed to establish branches within their districts. In order to extend the banking facilities of the farming sections, national banks are now allowed under the law to lend on improved and unencumbered farm land up to one-half of the value of the property for a period not exceeding five years.

The advantages of the new Act are many, chief among them being: First, the concentration of reserve funds which it provides within each region in order to strengthen and help any or all of the local banks which may need assistance in time of emergency. Originally it was proposed that a single central reserve bank be established after the plan which has long existed in England, France and Germany; but the small banks and the masses of the people feared a Wall Street control of this central institution and refused to accept any bill which involved this feature. The regional or district reserve bank plan was then adopted. Second, the new system places a premium upon commercial paper of short time, such as ninety days, and thereby removes in part at least the preference which the National banks have heretofore shown to stocks and bonds as collateral for loans. Third, the National banks are now for the first time in their history enabled to lend on farm mortgages as security, an important and most desirable addition. The farmer has paid higher interest rates and has been steadily discriminated against in the past because of his "slow" collateral, and even under the new system some traces of this must inevitably remain but a moderate share of the resources of the National banks may now be devoted to the farmer's needs. Fourth, the new Act remedies one serious weakness in our old system which constantly *brought us into difficulties*; viz., the absence of any central con-

trolling authority which would assure a broad, progressive and helpful policy in the management and direction of our reserve funds. Since there were neither official reserve funds for panic times nor any central authority to control them, it was necessary, in time of emergency, as we have seen, to depend on such desperate measures as an unofficial private dictatorship. That need no longer exist and we now have a healthy, normal means of directing and guiding the policy of all the reserve institutions. It is not improbable that this authority may even be strengthened in the future as new conditions may arise requiring it.

The report of the Comptroller of the Currency for 1914 shows:

Total number of national banks in operation	7,539
Capital.....	\$1,074,239,175
Bank notes in circulation.....	750,000,000

The specie currency of the United States now in circulation is divided as follows:

Gold coin.....	\$633,000,000
Silver coin and subsidiary silver.....	237,000,000

**Borrowing Money.**—The bonds of the United States are signed and issued by the Register of the Treasury who is appointed by the President and the Senate. This official keeps a complete record of all bonds issued, interest paid, bonds and currency notes redeemed, and all customs, internal revenue and postage stamps condemned for imperfections and destroyed. The more important work of determining within the limits set by law, the amount of bonds to be issued or redeemed, the denomination or size, the general conditions and the exact time of issue is performed by the Secretary of the Treasury in consultation with the President and Cabinet. The exercise of this important power has a strong influence upon the financial conditions of the country at large. In time of sudden financial stringency, the Secretary may, by buying back a quantity of bonds, place at the disposal of the banks a large amount of funds, which enter into circulation and thereby reduce the tension. Or under other circumstances he may find the public willing to buy government bonds but not to lend money—in such a case the Secretary may sell a quantity of bonds and deposit the money, received for them, in the national banks of certain sections of the country where it is most needed. This was done by Secretary McAdoo in 1913 with satisfactory results.

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## QUESTIONS

1. Why have the powers of Congress given rise to so much conflict of opinion among statesmen and in the courts?
2. Why were the Federal powers enlarged in 1787? Which powers were added at that time?
3. Why was the taxing power considered important?
4. What power of taxation had Congress under the Articles of Confederation and how was this changed in the new constitution?
5. What is the rule given in the constitution governing the levy of duties, imposts and excises (indirect taxes)?
6. Could Congress constitutionally tax the salary of a State official? See *Collector v. Day* and the 16th Amendment.
7. Congress levies a tax upon the circulating notes issued by State banks. Is it constitutional? Give reasons and a precedent.
8. Congress levies a tax on corporations and the Tax Collector includes the amount which a certain corporation owes to the City. Is this inclusion legal? Reasons and a precedent.
9. If Congress levied a tax on all personal property could it include such property as State or municipal bonds? Why? Give a precedent.
10. The State Government of X decides to take over the tobacco business within its borders and conduct it by State officials. Must it pay the Federal internal revenue tax on tobacco? Explain the arguments of the State and the decision of the Court, with reasons.
11. Explain the constitutional rule governing the levy of direct taxes.
12. In order to protect our natural resources Congress levies a duty of \$1.00 per ton on all coal exported from the United States. Would such a tax be constitutional? Reasons.
13. Do direct taxes have to be uniform throughout the United States? Reasons.
14. Could Congress levy a tax of 50% on the value of silks imported into the United States and a tax of 51% on imported tobacco?
15. Could Congress levy a tax of 50% on the value of woolen cloth imported into Philadelphia and 30% on the same cloth imported into New York City? Reasons.
16. Congress enacts a law providing that vessels passing from Chicago to Duluth shall pay a tax of one-quarter of 1% of the value of their cargo at the latter point, and shall make out clearance and entry papers for the voyage the same as if they were bound for a foreign port. Is this constitutional? Reasons.
17. In 1894 Congress levies a tax of 1% on all incomes over \$4,000. Is it constitutional? Reasons.
18. In 1913 Congress levies a tax of 1% on incomes over \$3,000. Is it constitutional? Reasons.
19. The Federal Government does not at present tax land. Could it constitutionally do so? How must a land tax be levied and why?
20. In order to discourage the attempts of the States to regulate business, Congress establishes a tax of 5% on the salaries of all officials employed in regulative work by the States. Is it constitutional? Reasons.
21. If the income tax of 1894 was unconstitutional, why was not the corporation tax of 1909 also so declared?
22. In 1900, a grocer imports coffee from the Philippines and is obliged to pay a small duty at the port of entry in the United States. He protests on the ground that the Constitution declares that duties shall be uniform throughout the United States. Decide the case with reasons.
23. Give and explain the most important sections of the Constitution limiting the State power to tax.
24. Illinois levies a tax of \$1.00 per ton on steamboats and other craft which ply the waters of the State. Is the tax constitutional? Reasons.
25. Illinois levies a tax on all movable property owned or located in the

State, including vessels owned by residents, and located within its boundaries. The tax is 1% of the value. Is it constitutional? Reasons.

26. Illinois taxes the notes of the new Federal reserve bank located in Chicago. Is the tax constitutional? Reasons. Cite an authority.

27. Could Massachusetts protect the health of its people by establishing a State quarantine or health inspection service and charging a small inspection fee on all goods imported into the State, in order to cover the cost of the medical officers in examining the imported goods? Explain the reasons and cite the clause of the Constitution in question.

28. If Congress gave its consent could a State levy a general tax on imported articles?

29. Explain fully the meaning of the general welfare clause of Article I, Section 8.

30. You are present at a discussion in which the power of Congress to regulate the public school system is argued. Someone claims that Congress has the power to do so under the general welfare clause. What would be your views?

31. At the urgent insistence of temperance societies Congress doubles the present internal revenue taxes on intoxicating liquors. A distillery owner objects to the payment of the tax on the ground that it will destroy his business, which Congress cannot do under the 5th Amendment, and that Congress has no power to regulate manufacturing. He complains that the tax is an attempt to discourage and thereby regulate the distilling business. What would the court decide? Reasons.

32. Would a law which levied a tax of 2c per pound on imitation butter and made it unprofitable to produce such imitation butter, be constitutional?

33. In 1920 Congress levies a heavy tax on automobiles. You own an automobile on which you have already paid taxes to the State. Could you claim that the Federal law was unconstitutional because of double taxation?

34. How have the State and national governments heretofore kept their subjects of taxation, or sources of revenue separate?

35. What subjects are they now both taxing?

36. Explain briefly the newer drift of public opinion in taxation and its effects upon proposed tax laws?

37. Is taxation without representation unconstitutional?

38. In a discussion of the Federal income tax of 1913 it is claimed that the law is unconstitutional because it exempts incomes under \$3,000 and thereby violates Article I, Section 8, which requires that certain taxes shall be uniform throughout the United States. Give your views as to the strength of this claim, with reasons.

39. Give a brief summary of the chief sources of national revenue.

40. What is the difference in the cost of collection of customs and internal revenue respectively?

41. Give a brief summary of the chief expenditures of the government,

42. Outline the outstanding indebtedness of the United States.

43. Explain how customs duties are collected and the administrative organization for this purpose.

44. Outline the organization for the collection of internal revenue, and show the chief items of such revenue.

45. Summarize briefly the method of auditing accounts in the national government.

46. Does Congress or do the people know accurately the efficiency, economy or extravagance of the executive departments? Why?

47. What is the purpose of the national budget?

48. Explain the work of the secret service division.

49. Why has its authority been limited by Congress?

50. What is the constitutional power of Congress over currency?

51. In order to pay the expenses of the Civil War Congress issued a large amount of paper money and declared such paper to be legal tender in payment of debts between individuals. Was such action constitutional? Reasons.

52. It also declared this money to be legal tender for debts contracted before the passage of the law. Was this constitutional?

53. Why has it usually been more difficult for the farmer and the business man to secure credit, in times of panic, than for the stock speculator?

54. How has the separation of the resources of different banks and the failure to co-operate increased the dangers of banking and the seriousness of panics in the past?

55. Explain how the new Federal banking act aims to remedy the weaknesses pointed out in the last two questions.

56. How does the United States borrow money? How may the Secretary of the Treasury aid the farmers in marketing their crops in times of tight money?

## CHAPTER VI

### THE POWERS OF CONGRESS—Continued THE REGULATION OF COMMERCE

**Chief Purposes of Regulation.**—The Government to-day is a silent partner in every large business. Public regulation has grown steadily in all fields, and in spite of the outcry raised against paternalism and radicalism, a close examination of our regulative laws shows that most of them are really designed to *protect* and *preserve* the business welfare of the community. They are aimed to safeguard the interests of (a) the consumer and (b) the investor, and they represent two great changes in the public opinion of our time. (a) The consumer was formerly thought to be amply protected by the ordinary action of the laws of supply and demand. If the producer sold fraudulent articles or charged extortionate prices, or was guilty of other acts injurious to the interests of the consuming public this would soon be discovered and he would be displaced by competitors who would be more honest, more moderate in prices, or more thoughtful of the public interest. Such was the accepted belief of the leading thinkers of former days. Our laws were based on this doctrine, but the experience of the newer generations has shown us that the doctrine no longer holds true under modern conditions. The buyer to-day does not know personally either the manufacturer, the wholesaler or the retailer whose goods he purchases. Trade has ceased to be local and become national and even international in scope. An article may be what it seems, but it may also not be. Producers of some standard necessary of life may combine together to extort unreasonable prices from the public. Fraud may be practiced in manifold ways, so that the consumer is unable to protect himself. He has become thoroughly aware of this fact and demands protection. These changes in the conditions and in the beliefs of the people have produced a strong tendency towards Government regulation for the protection of the consumer. (b) The investor has likewise undergone a profound change in his beliefs and in his attitude towards the Government. We used to consider it the buyer's business to protect himself in any deal. The old English legal principle *caveat emptor*—"let the buyer beware"—meant that every purchaser was thrown on his own resources in the open market; if he were deceived it was from lack of due care and caution. Practical as this rule may have been some generations ago, we can no longer rely wholly upon it in the purchase of stocks, bonds, and securities to-day. *The investor now demands that there shall be at*

least some minimum standard of safety and honesty in the issue of securities, and that this standard shall be fixed by the Government as far as possible and enforced by it.

Closely related to this protection of the investor is the effort of the Government to safeguard the small producer. This is especially seen in such measures as the anti-trust laws. For over a century the common law of England and America has forbidden the formation of monopolies and attempted to uphold complete freedom of competition. Its purpose in doing so has been chiefly to secure the benefits of competition to the consumer, but more recently we have also been strongly influenced in our legislation by the demands of small producers themselves for protection against destructive practices, business piracy, and illicit or dishonest customs which are often resorted to in the war of competition. Such customs and practices injure the consumer indirectly, but they directly and immediately destroy the producer himself, and are felt first by him. No small part of the influences which have led to our anti-trust laws is due to organizations of producers who have banded themselves together for protection, and now demand Government regulation to this end.

**The Federal Power.**—The authority to regulate commerce is the most frequently used of all the powers of Congress. Most of the questions of national politics in which we are deeply interested are based on the commerce power; these include the control of the trust, the railways, express companies, telephones and telegraphs, corporations, pure food, etc. In the moment that any corporation engages in trade between the States it becomes subject to the legislation of Congress. This explains why the attention of the people has become so closely fixed upon the regulative power as to make it the very center of government activity to-day. The business men of 1785 found that State regulations and State taxes were hampering the free flow of trade between the States. They met in a convention at Annapolis and called for a new system of government which would give to the *national* authorities the sole right to regulate business between the States. This movement was not successful until, in 1787, the new Constitution declared in Section 8 of Article I, that Congress shall have power "to regulate commerce with foreign nations and among the several States and with the Indian tribes."

The government's control over business as contained in this clause of the Constitution has raised several practical questions:

What is "Commerce"?

Does it include manufacturing?

What is the present system of regulating commerce?

What have been the results of regulation?

What is the relation of the Federal control to State regulation of commerce?

**Meaning of "Commerce."**—What is Commerce? Chief Justice *Marshall*, than whom no greater authority can be cited, has said in

*Brown v. Maryland*, 12 Wheaton, 419; 1827, "Commerce is intercourse." The gradual expansion of the term is traced by Thomas H. Calvert in his *Regulation of Commerce* in which he quotes Justice Harlan of the Supreme Court as follows: "Commerce among the States embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph." It is fortunate that our highest court in defining "commerce" has taken such a broad and statesmanlike view. Had it adopted a narrow interpretation, the power of Congress might have been so severely limited as to deprive the national government of its authority. Since 1787, the economic progress of the country, the growth of mechanical inventions and the increase of population have all combined to make "commerce" one of the greatest businesses of the nation and with every step in this growth the Federal authority has kept pace. Every new invention and discovery which promotes intercourse, increases the power of the national government to that extent. Chief Justice Waite in 1877 said (*Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1):

"The powers thus granted over commerce and postal mails are not confined to the instrumentalities of commerce, or the postal system known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing vessel to the steam-boat, from the coach and the steam-boat to the railroad and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances."

**Does "Commerce" include Manufacturing?**—The importance of this question for the business man may be seen at once from the fact that practically every business except farming, mining and the professions, would be subject to the direct control of the National government if commerce were so broadly defined as to include industry. This interesting problem came before the Supreme Court in the case of *United States v. E. C. Knight*, 156 U. S. 1; 1895. Congress having passed an act prohibiting monopolistic combinations in interstate commerce the question arose, is a *manufacturing* combination subject to this law? The attorneys for the Knight Co. declared that manufacturing was the change of form while commerce was the change of place, and that Congress had control over commerce but not over manufactures, according to the plain meaning of the constitutional clause. This view was upheld by the Supreme Court. Industry is not commerce. But practically, this distinction is becoming daily of less importance since every large manufacturing enterprise is now obliged to engage actively in trade between the States. It must transport its raw materials and sell and ship its

finished product. The assembling and distribution of these materials and products has now become so closely connected with their manufacture as to be inseparable in practice; which amounts to saying that our large industrial companies have become subject to the commerce regulating power of Congress. Over this great current of interstate trade the authority of Congress is absolute and plenary, subject only to the restraining clauses of the Constitution.<sup>1</sup> It may pass laws to remove obstacles from trade, to protect commerce from dangers and evils which are threatened, to regulate the kinds of commerce which shall flow from State to State and the channels by which it shall flow, and even to prohibit commerce temporarily, for a proper legitimate purpose.

**The National System of Regulation.**—How has Congress used its power to regulate commerce? Originally the power was exerted chiefly for the protection and encouragement of shipping and navigation. Lighthouses, harbors, coast surveys, fisheries, etc., were controlled in great detail to the exclusion of other matters. But in the last twenty-five years an important change in our national policy has taken place. Popular attention has been directed towards the trusts, a strong demand has arisen for some control over these large corporations, and Congress in response has exercised its authority along entirely new lines. Three different kinds of corporate regulations have been attempted, corresponding to three interesting stages of popular sentiment on "trusts" and combinations of capital. First, the thought was that, since the trust thrived on secret rebates and discriminations granted by the railways, if these could be prevented the trust would be destroyed. This feeling caused the passage of the commerce law of 1887, prohibiting rebates. In the second stage, the people felt that the act of combination itself was an evil and should be prohibited by law; hence the Sherman Anti-Trust Act of 1890. In the third stage, the combination was acknowledged to be a sound economic form of business but the chief evil seemed to be over-capitalization or stock-inflation. This should be checked by publicity, hence the laws of 1903 and 1909. Let us examine briefly the various evils which were aimed at by this legislation and the practical results achieved. Foremost among these lies the question of railway discrimination in favor of the larger shipper as against the smaller.

**Railway Discriminations and Rebates.**—One of the chief purposes of the national laws regulating commerce has been to suppress railway discrimination and the rebate. The original form of this practice was a lower rate quoted to the large shipper, but as this inequality soon became known and aroused antagonism the discrim-

<sup>1</sup> The most important of these clauses are the prohibition of taxes on articles exported from any State and of preferences to the ports of any State, also the declaration that vessels in the coasting trade shall not be obliged to enter clear or pay duties while passing from one State to another; all are contained in Article I of the Constitution. The purpose of these restrictions has already been explained under *Taxation*.

ination was then changed in form. The large shipper was quoted the same rate as his small competitor, but he received a secret discount or rebate of part of this charge. The practice of rebating became so general in certain industries that all shippers asked and secured these secret variations from the published railway rates, the amount varying according to the size of the shipper's tonnage. Many of the railways had oral or written agreements providing for a return of part of the freight charge in this way, and some of these agreements have been produced in judicial proceedings and are matters of record.

After the rebating practice had become thoroughly established, the large shipper decided to extend his advantage one step further by demanding a rebate not only on his own shipments but also on those of his competitors. He was not always able to secure this but if he controlled a sufficient amount of freight to make it worth while for the railway to accept his terms he was successful. Court records show for example that one railway allowed its largest freight shipper a rate of 10c per barrel of oil, whereas his competitors were paying 35c per barrel, and that the railway furthermore paid to the large shipper the sum of 25c per barrel, *on his competitor's freight*, which was the difference between his rate and that charged the small shipper. The large company thereby enjoyed an advantage of 50c per barrel over its competitors in the cost of marketing its product. This entire practice is now forbidden by the Act of 1887, and the amendment of 1903, providing that "it shall be unlawful for any person, persons, or corporation to offer, grant, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act." "Every person or corporation whether carrier or shipper who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebate, concession, or discrimination shall be deemed guilty of a misdemeanor." So long as the Act punished only the railways, it was difficult if not impossible to enforce it, since the initiative in rebating did not usually come from the carrier but from the shipper, who demanded a drawback. But the amendment of 1903 just cited, which visited a punishment upon the shipper who demands, as well as the carrier which offers or grants the rebate, speedily put an end to the grosser forms of drawback and the practice has steadily diminished. In 1906, four of the principal railways of the country and three large industrial combines were fined for rebating, some of the traffic managers being penalized as much as \$10,000 each and one railway company being fined \$118,000. That the illicit custom has not died out yet is due to the fact that some hope has remained until recently of devising new indirect methods of rebating which might stand as legal.

**Private Cars.**—*The special freight car owned and used by shippers or by large private concerns like the refrigerating companies,*



plays an important rôle in interstate trade.<sup>1</sup> It has been of great value in offering special equipment and service for peculiar kinds of traffic such as vegetables, fruits, meats, and perishable products. Discriminations have crept in by the practice of allowing the owner of the car, if he is a large shipper, to send it over the line at such a low rate as to give him practically a concealed rebate; also by allowing the large companies which own refrigerator cars to make their own charges to shippers. These charges include a payment for icing the car, etc., and these have varied so heavily between different customers as to favor some and disable others in their efforts to compete. The Commerce Act now gives to the Commission the power to supervise and regulate these charges and services.

**Private Railways.**—The shipper may establish his own private road leading from the main railroad into his plant, and he may then deduct from the total freight rate a charge for carrying the goods over his own line. This charge for his own services on his private railroad in the plant may be raised to such a point as to amount practically to a rebate. An extensive system of discriminations or favors to large plants has grown up, amounting to millions of dollars yearly.

**Demurrage Charges.**—Demurrage is a charge by the railroad for the failure of the shipper to load or unload cars promptly on arrival at their destination. The charge represents the cost of keeping the cars idle while occupied by the shipper's goods. It may be calculated in such a way as to discriminate against the small shipper in favor of his larger competitor.

**Car Supply.**—In certain industries, such as coal mining, the problem of securing enough cars to ship the product to market has become as important as the older question of freight rebates. If the railway is desirous of favoring a heavy shipper, it may grant him a larger supply of cars for his mine, while cutting down his smaller competitor to such a number that the latter is unable to fill his orders and is placed at a serious disadvantage in the market. In one case the testimony taken in Court showed that of two mines located side by side on the railway and both having about the same output, the mine owned by a favored operator was given a preference of 175 per cent over his competitor in the supply of cars.

**Restrictions of Side-Track Facilities.**—A railway company can deny or limit the side-track facilities of a shipper in such a way as to cut down his output and prevent him from shipping the full capacity of his mine. That this is poor policy is evident, and the only reason for such practices as those described is the desire of some railway official to favor a company in which he or his friends are interested. In one authenticated case a mine operator was promised a switch or side-track into his mine on condition that he send a check to cover the expense of construction. Later the check

<sup>1</sup> See Weld: "Private Freight Cars," in *Columbia University Studies in History, Economics and Public Law*, 1908.

was returned and he was notified that the company had decided not to build the siding. Another mine owner on complaining to a friendly railway official of the company's refusal to put in a siding for his coal, was advised to sell his mine. Such discrimination is usually prohibited by the State laws which require the common carrier to transport goods presented for shipment and which also require the company to furnish reasonable track connections for mines and other industrial enterprises. The Federal law requires the same of interstate railways. (Sec. 1, Interstate Commerce Act.) Undoubtedly the stockholders of the railways would repudiate such practices but as the discriminations described above are not known to the stockholders, the shipper has been obliged to secure his protection from the law.

**Discriminations at the Railway Terminal.**—After the shipper has secured equal freight rates with his erstwhile favored competitor, he may find that the latter is obtaining some special privilege or lower charge at the terminus of the railway for the services rendered there. These services cover in modern trade such a large field as to be of vital interest to every manufacturer or shipper. The storage of freight in elevators or warehouses, the ferrying of freight across rivers or a harbor, the private exclusive use of special parts of the railway company's equipment such as piers, wharves, docks, etc.—all these must be watched by the shipper to see that his terms are equally favorable with those given his competitors. In order to prevent these forms of discrimination, the Commerce Act has conferred on the Commission the supervision and control over all terminal services directly or indirectly connected with transportation, and the Commission now regulates not only the charges, but also the kind of service rendered. In order to insure fair treatment of all shippers, the law also contains this sweeping clause:

“That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give *any undue or unreasonable preference or advantage* to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to *any undue or unreasonable prejudice or disadvantage* in any respect whatsoever.”

The injured shipper may also recover in a suit for damages. Rebates, as we have seen, are especially forbidden, both the giver and receiver being subject to a fine of from one to twenty thousand dollars and imprisonment for two years.

**Discriminations Against Cities and Districts.**—Another form of discrimination which has caused much trouble and against which the law of 1887 is directed, is the difference in railway rates to different cities and sections of the country. It is to the interest of the railway to build up a *long haul*; points at the end of its line are *sometimes favored at the expense* of nearer cities. The reason is

that the railway can handle traffic more cheaply and develop a more profitable business on long distance freight. This often leads to a higher charge for a short haul to the nearby town than for a longer one to the city at the terminus of the road, and therefore works injustice to the nearer points. The necessity for a reduction of rates as a rule arises from discrimination against particular places, but not from the general level of rates charged, which is lower in this country than in other parts of the world.

The real problem of government rate control to-day is the competition between different sections of the country for the same market. The manufacturers and merchants of the Atlantic seaboard are competing with those of the Mississippi Valley to win the trade of the Rocky Mountain States and the Pacific Coast. The slightest change in through railway rates westward is bound to affect this competition and help one section at the expense of another. The railways understand this and their efforts are bent towards a scale of rates which will encourage the most traffic at a high profit and at the same time answer the needs of the communities through which they pass. But frequently circumstances beyond their control, such as water transportation, competing railways at terminal points, or the rise of new industries requiring special rates for their encouragement, intervene to compel an entirely different basis of rate-making from what would otherwise be possible.

Amidst all this maze of bewildering and conflicting interests there must be some impartial tribunal which shall survey the whole field of rates and regard each local question in its connection with the entire problem of industrial competition. This is the work of the Interstate Commerce Commission. We may appreciate the magnitude of its sphere and its transcendent importance to the business of the country when we realize that every accurate study of rates, and every just decision as to their reasonableness, must be based on a knowledge of the physical and financial condition of the railway and its competing lines, and the business conditions at the origin and destination of the traffic, together with those of other competitive districts which may be affected. Gradually the Commission is being forced to become the economic supreme court of the American transport world and to establish a system of rates which shall give to the manufacturers and merchants in each section a special facility in reaching their markets. The Commission consists of seven members appointed for seven years. This body has power to receive complaints of shippers, investigate rates and ascertain if undue preferences or discriminations exist. It may also order the necessary changes to remedy discriminations and excessive rates. It holds hearings of all parties concerned, and provides a quick, simple and cheap form of procedure so that both railway and shipper may secure an equitable adjustment of their *differences*. Having heard both sides and made such independent

investigations of its own as it may wish, the Commission issues a rule or order deciding the case. From this an appeal was taken to a United States District Court, and thence to the Supreme Court. In 1910 a special Commerce Court was organized to hear such appeals, with the thought that its judges would soon become specialists in railway cases in a way that the district judges could not, and that decisions would thereby be greatly hastened and improved in quality. The Commerce Court judges speedily familiarized themselves with their duties and a marked improvement in the speed of decisions was noticeable. But many of the important early decisions were unfavorable to the Commission and the impression gained ground that the Court was attempting to act as a damper upon the Commission's efforts to secure fair treatment for the shipper. This led to a general movement to abolish the Court which succeeded in 1913, and appeals from the Commission now go to the U. S. District Courts. It is most unfortunate that the special court idea has been abandoned. Its two strong features already noted, viz., special knowledge of railway law and quick procedure, had begun to commend it to both shipper and carrier and it may be hoped that the idea will be revived in a more favorable form in the near future. The powers of the Commission cover not only railways but also private car lines, sleeping cars, parlor cars, express companies, pipe lines,<sup>1</sup> telegraph, telephone and cable

<sup>1</sup> **Pipe Lines.**—Although the Commerce Act expressly includes pipe lines under the jurisdiction of the Commission, subjecting their services and rates to national control, the extent of this clause of the Act was not clearly appreciated until the decision in *U. S. v. Ohio Oil Co. et al.*, 234 U. S. 548; 1914. The pipe lines which were regulated by the Commerce Commission in this case, and which appealed from its rulings, controlled most of the oil from the fields east of California to the Atlantic seaboard and piped it eastward to the coast on condition that the oil should be sold to the company. The Standard Company owning the Ohio Co., and its co-defendants, by refusing to carry any oil except under these terms made itself master of the oil fields without the necessity of owning them and carried across half the continent a great volume of commerce, coming from many owners but controlled by the Standard Oil Co., through its pipe lines. The Commerce Act, as amended in 1906, applied to pipe lines which were common carriers. The oil companies contended that the oil was their own property and they, not being common carriers, were not subject to the rate regulations governing transit by pipe lines, as fixed by the Commission. The Supreme Court, however, decided that the act clearly applied to all pipe lines engaged in the transportation of oil from fields not owned by them. "It not only would be a sacrifice of fact to form, but would empty the act if the carriage to the seaboard of nearly all the oil east of California were held not to be transportation within its meaning, because by the exercise of their power the carriers imposed as a condition to the carriage a sale to themselves. As applied to them, while the amendment does not compel them to continue in operation, it does require them not to continue except as common carriers. That is the plain meaning, as has been held with regard to other statutes similarly framed." A sharp distinction was drawn by the Court between the companies which transported oil from the fields of other owners, even though sold to the pipe line as a condition of transportation, on the one hand, and those pipe lines which transported oil from a field owned by the company, to a refinery in another State owned by the same company. This was true of the Uncle Sara

companies, shipments of goods partly by rail and partly by water, storage charges, etc. The Commission also prescribes a uniform system of accounts for carriers, and requires reports from them on earnings. It enforces the law governing air brakes and other safety appliances on interstate trains.

All new changes in rates made by any company may be suspended by the Commission until it examines their reasonableness and it may also on its own judgment investigate any rate, and order a reduction even where there has been no complaint. When the common carrier applies for approval of an increase in rates the burden of proof is upon the carrier to show that such increase is reasonable and just. Railways are not allowed to charge more for a shorter than for a longer haul over the same line, except with the consent of the Commission.<sup>1</sup> The purpose of all these provisions is

Oil Company. "This company has a refinery in Kansas and oil wells in Oklahoma, with a pipe line connecting the two which it has used for the sole purpose of conducting oil from its own wells to its own refinery. It would be a perversion of language, considering the sense in which it is used in the statute, to say that a man was engaged in the transportation of water whenever he pumped a pail of water from his well to his house. So as to oil. When, as in this case, a company is simply drawing oil from its own wells across a state line to its own refinery, for its own use, and that is all, we do not regard it as falling within the description of the act, the transportation being merely an incident to use at the end."

<sup>1</sup> This is the celebrated long and short haul clause. Its purpose is to prevent discriminations against particular districts in the making of railway rates. Such discrimination is necessary, railway men contend, in many parts of the country. The transcontinental lines running westward to the Pacific Coast have found that their through freight charges to the coast cannot exceed greatly the cost of water transportation to the Pacific cities, especially on slow freight, otherwise this traffic will be diverted to the water. Consequently the whole transcontinental rate system has been built upon a low through rate to the coast. But this reduces the profits of the carriers so greatly that they must recoup by charging a higher rate on freight destined to intermediate points such as Spokane, Denver, Reno, Ogden and the other cities located in the mountain and intermountain region. This explains why for many years the charge on freight to cities in the mountains was higher than if the goods were shipped a longer distance through the mountains to the coast. For over twenty years the commercial bodies in this mountain region have been trying to secure an amendment of the commerce law which would compel the carriers to give them the same low rates as were enjoyed by coast cities. This effort succeeded in the new form of the long and short haul clause which was adopted by Congress June 18, 1910. It forbids the railways to charge more for a short haul than for a long one over the same line in the same direction, except with the consent of the Commission. All the transcontinental companies applied for this consent. The Commission in its order covering the case granted their request only in part. It divided the country into zones or regions corresponding with the separate groups of Railways, and decided that freight charges from the eastern zones might be slightly higher to intermediate points than to the Pacific coast cities, but that freight charges from the western zone to intermediate points must not be higher than the through rate to the Pacific cities. The westernmost zone, which was numbered one, corresponded roughly to a line drawn south from Minnesota to the Gulf of Mexico, and included all the country west of this line. In this zone the freight rate on goods westbound to intermediate points must not exceed the through rate to the Pacific cities, that is on the *shortest hauls in this district* the through rate, and not more than the through

to stop discriminations and insure greater equity of treatment for all who use the railways.

**Results of the Law.**—The results obtained by these laws have amply justified their passage; rebates have not ceased but they are

rate might be charged. The Railways might charge less if they chose. Four other zones were mapped out east and south of zone No. 1, according to their distance from the Pacific coast. In zone No. 2 the railways might charge 7% more on freight rates to intermediate points than to the Pacific coast terminals. In zone No. 3 15% more; in zone No. 4, 25% more, so that roughly speaking the greater the distance from the Pacific coast terminals the higher might be the charge on freight going to the intermediate points. The railways, dissatisfied with this ruling, appealed to the courts, and the final decision by the Supreme Court in this dispute is one of the most important which it has rendered on railway questions within recent years. (*U. S. v. Atchison, Topeka & Santa Fe, et al.*, June 22d, 1914.) The main point on which the railways contested the case in the courts was that the Commission was exercising a legislative power which under the Constitution could be wielded only by Congress. It was claimed that when the Constitution declared in Article 1, Section 1, that all legislative powers herein granted *shall be vested in a Congress* it clearly implied that no legislative power could be vested in any other authority. But if the Commission were to say, as the Short Haul Clause of 1910 permitted it to say, when a railroad should be subject to the clause and when it should not, this was clearly a use of legislative power by the Commission, and was therefore unconstitutional. Not even Congress itself could delegate its own power to another body, and it, like all the other authorities of Government, must obey the Constitution. Any authority or legislative power of Congress could not be delegated to a Commission. In addition the carriers also claimed that even if the Commission could receive such power as had been given to it in the Long and Short Haul Clause, it had no authority to divide the country up into arbitrary zones and regions and to determine the conditions of freight charges under which these regions should trade with each other, nor to fix any proportion of percentage, such as 7%, 15% and 25% between different sets of rates and to fasten these percentages upon the freight charges of the country. Both of these claims were rejected by the Supreme Court. It held that there was no unconstitutional delegation of power by Congress to the Commission, since Congress had only fixed a general principle, viz., the reasonableness and fairness of rates and the general rule forbidding discrimination. Congress had then turned over these principles and rules to the Commission with authority to execute them in particular cases. The Court pointed out that previous to the passage of the act the power to fix rates and proportions between rates belonged to the railways, and that such a power was in its essence public and governmental. Congress had taken this power from the railways and vested it in the Commission. "How can it otherwise be since the argument as applied to the case before us is this: that the authority in question was validly delegated so long as it was lodged in carriers, but ceased to be susceptible of delegation the instant it was taken from the carriers for the purpose of being lodged in a public administrative body?" It followed that if Congress could fix the general principle and entrust its execution to the Commission, the Commission could very properly carry out this entrusted duty, not only by fixing the particular rate to a certain city, but by declaring that a whole series of rates to designated points must bear a certain relation with those towards other points, since in this way it would be carrying out the command of Congress to see that rates were reasonable and that discrimination was prevented. As to the division into zones, the Court found that no arbitrary or unreasonable action had been taken by the Commission in doing this. It was, in fact, the most natural method of fixing the general relation of rates between different parts of the country, and was founded upon a *practice and custom of the railways themselves in dividing the country into territorial regions*. "As we have pointed out, though somewhat modified,

being rapidly suppressed and are punished with severity. Over \$200,000 in fines are yearly levied for giving and accepting rebates, and vigorous prosecutions are being pushed wherever evidence is obtainable. Numerous shippers injured by other forms of discrimination have brought suits before the Commission and in the Federal Courts and have received substantial awards of damages. The chief obstacles in such prosecutions are the newness of the legal questions involved, the difficulty of obtaining evidence and the great expense and delay incurred in preparing a case against the favored shipper or the railway. But the large amounts at stake have attracted some skillful attorneys to this field, the courts are becoming more familiar with the questions at issue and the legal precedents are now being rapidly fixed so that the shipper who has been injured by unfair discriminations has, with every year, a stronger likelihood of securing adequate damages. The greater danger of detection and heavy loss also makes rebating less attractive and the whole problem of giving to all producers a fair and equal opportunity to use the railways is slowly nearing a solution. It would be greatly aided by some means of further hastening court procedure in law-suits on railway cases.

Over 7,500 complaints, formal and informal, are yearly received by the Commission; of its own accord it has made important use of its power to investigate, one inquiry for example resulting in a complete change and renovation in the methods of the express companies. The Commission considers this its most important single piece of work and sums up the results as follows: "The double collection of charges has been prevented, discriminatory rates have been or will be abolished, through routes have been and are being established which will secure a direct and properly expeditious service, and a new and original system of stating express rates by blocks has been devised and will soon be put into operation, under which it will be possible not only for the express agent himself, at a given station, to determine at a glance the rate between his office

the zones as thus selected by the Commission were in substance the same as those previously fixed by the carriers as the basis of the rate making which was included in the tariffs which were under investigation, and therefore we may put that subject out of view. Indeed, except as to questions of power, there is no contention in the argument as to the inequality of the zones or percentages, or as to any undue preference or discrimination resulting from the action taken. But be this as it may, in view of the findings of the Commission as to the system of rates prevailing in the tariffs which were before it, of the inequalities and burdens engendered by such system, of the possible aggrandizement unnaturally beyond the limits produced by competition in favor of the competitive points and against other points by the tariff in question,—facts which we accept, and which indeed are unchallenged,—we see no ground for saying that the order was not sustained by the facts upon which it was based, or that it exceeded the powers which the statute conferred, or transcended the limits of the sound legal discretion which it lodged in the Commission when acting upon the subject before it." This sets at rest finally the legal question as to the powers of the Commission over the transcontinental lines and over the long and short haul clause.

and every other express office in the United States, but even the shipper can qualify himself by a few moments' study to ascertain the same facts."

The criminal prosecutions conducted at the request of the Commission are few in number; in 1914, 58 new indictments were returned and 80 prosecutions were concluded. In 64 of these finished cases the defendants pleaded guilty, in 4 others convictions were secured, 11 cases were dismissed and no verdict of not guilty was rendered. Although those who violate the act show remarkable ingenuity in devising new methods of evasion, the courts usually take a broad view of the scope and purpose of the law and allow comparatively few to escape on merely technical grounds. For example, it was attempted to evade the law in New York by having the employes of several shippers also taken into the nominal service of the railway as "freight agents," and paid a heavy commission for such supposed service, this payment being in reality a rebate on the freight charges.

By this subtle device it was thought that the rebate prohibition of the act could be circumvented but the district court regarded the whole transaction in its true light and fined the defendants from \$1,000 to \$3,000 with one day's imprisonment, while the railway representative who participated in the plan was fined \$15,000. Another devious method was worked out between certain theatrical managers of Cincinnati and the passenger agents of a large railway system, by which the railway inserted advertisements in the theater programs and paid excessive amounts, in return for which travelling theatrical companies were routed over the company's lines. Here the carriers pleaded guilty and were obliged to pay a substantial fine. In other cases the shipper has given his promissory note to the carrier in payment of a freight bill, but the courts have held that all collections must be in actual money and all arrangements for payment in credits or any other property than money are illegal. One of the most valuable points established by the courts has been fixed in the cases decided against the railway lines which owned docks at the various Lake Erie ports; these carriers have leased out their dock properties to separate dock companies. The latter have been managed in the exclusive interest of certain shippers and have excluded others from the use of the terminal facilities owned by the railways. Such an exclusive lease is in substance a highly important advantage to one shipper as against others and the district court in levying fines of \$123,000 upon the companies concerned has established an important precedent governing this form of discrimination.

The regulation of rates by the Commission has frequently been criticized on the ground that the Commission often interferes to change rates without a sufficient regard for the economic conditions which justify the rates; it is complained that the Commission is too prone to make an arbitrary ruling which may change the whole



traffic conditions of an industry or a district, or that it encourages one interest at the expense of another, without adequate knowledge of the facts. In short the Commission's rate making is said to be too theoretical and arbitrary. While there has doubtless been some truth in this criticism, yet the main results of the regulations have been to secure greater fairness of treatment for all shippers and for all sections of the country, and it was for this purpose that the law was passed.

**Proposed Control of Water Rates.**—The House Committee on Merchant Marine, after an extended investigation lasting two years, introduced a bill in June, 1914, providing for the extension of the powers of the commerce commission over water carriers in interstate and foreign trade, and the enlargement of the body to eleven members. This important measure proposes that all shipping combines, pools, and agreements shall be submitted to the commission, which shall either approve or disapprove them. If it approves, the agreement in question shall be exempt from the provisions of the Sherman Act; if it disapproves, prohibitions of the Sherman Act shall apply. Rebates are to be forbidden, as are also other forms of discrimination now widely practiced. The commission is given full power to revise water rates and charges, and to prescribe rules of service within reasonable limits. For many years the high seas which, next to the air, are theoretically the freest medium of transport known, have been in reality the most completely subject to control by combinations. It is no exaggeration to say that all important shipping lines carrying either the foreign trade of the United States or the regular coastwise traffic, have been held under the iron rule of "conferences" and pools and their agreements. It was no more possible to run an independent competitive line of steamships than it would have been to build a new transcontinental railway parallel with existing lines. The problem is all the more difficult because of the element of foreign control of many of the companies. The committee's bill shows a remarkable and statesmanlike view of the question, in that it does not attempt the impossible, viz., to forbid all pools and agreements in restraint of trade, but frankly acknowledges the necessity and benefits of many of these agreements and seeks to protect the public by requiring them to be submitted to the Federal authorities.

**Federal Arbitration of Railway Labor Disputes.**—One of the greatest services rendered by the government has been its successful effort to prevent great railway strikes, by arbitration. The Erdman Act of 1898 as amended in 1913 provides that whenever a labor controversy arises between an interstate carrier and its employes, a board of mediation, composed of the Federal Commissioner of Mediation and two other government officials, all appointed by the President with the consent of the Senate, shall on the application of either party, use their best offices to bring *the two disputants together* and effect an amicable settlement

between them. If this attempt fails, the board shall then induce the parties, if possible, to agree to arbitration. Arbitration is to be conducted either by a board of three members, chosen by the parties themselves and by the board of mediation, or else by a board of six members. In the latter case each disputant names two of the six, and these four name the other two. Or if they fail to agree in their choice, then the Board of Mediation names the remaining two members. The advantage of the larger board is that it offers less danger of a great dispute involving many millions of dollars, and thousands of employes, being settled by the vote of a single arbitrator, as was always the case in the three-men board of the original Erdman Act. Senator Newlands' amendment in 1913 seeks to remove this danger by enlarging the board to six members, and thereby greatly increases the willingness of the railway managers to entrust the settlement of their labor disputes to arbitration. The parties having consented to arbitrate, sign an agreement<sup>1</sup> which binds them to continue in peaceable relations until the award is filed and to accept the award for a period of at least one year. During the first three months neither side will discontinue relations without giving thirty days notice to the other. Within ten days from the filing of the award an appeal may be taken to the Circuit Court of Appeals. The Erdman Act has been successful in avoiding serious strikes and lockouts. The arbitration boards,

<sup>1</sup> The provisions of the Act governing the agreement are: "Sec. 4. That the agreement to arbitrate—First. Shall be in writing; Second. Shall stipulate that the arbitration is had under the provision of this Act; Third. Shall state whether the board of arbitration is to consist of three or six members, according to the wishes of the parties; Fourth. Shall be signed by duly accredited representatives of the employer or employers and of the employees; Fifth. Shall state specifically the questions to be submitted to the said board for decision; Sixth. Shall stipulate that a majority of said board shall be competent to make a valid and binding award; Seventh. Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board, as provided for in the agreement, within which the said board shall commence its hearings; Eighth. Shall fix a period from the beginning of the hearings within which the said board shall make and file its award: Provided, That this period shall be thirty days unless a different period be agreed to; Ninth. Shall provide for the date from which the said award shall continue effective and shall fix the period during which the said award shall continue in force; Tenth. Shall provide that the respective parties to the award will each faithfully execute the same; Eleventh. Shall provide that the award and the papers and proceedings, including the testimony relating thereto, certified under the hands of the arbitrators, and which shall have the force and effect of a bill of exceptions, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arises or the arbitration is entered into, and shall be final and conclusive upon the parties to the agreement unless set aside for error of law apparent on the record; Twelfth. May also provide that any difference arising as to the meaning or the application of the provisions of an award made by a board of arbitration shall be referred back to the same board or to a subcommittee of such board for a ruling, which ruling shall have the same force and effect as the original award; and if any member of the original board is unable or unwilling to serve, another arbitrator shall be named in the same manner as such original member was named."

appointed under it, have rendered decisions affecting a comparatively small number of highly important cases involving hundreds of thousands of employees. The public, while it understands little of the controversy before the board, is inclined to back up the board's decisions, and it would be extremely difficult for either party to violate an award without incurring public disfavor.

**Federal Control over State Trade.**—We come now to the constitutional problem—Can the Federal authorities regulate intrastate commerce? In general, the answer is No. The rule for interpreting the powers of Congress in such cases is given in the 10th Amendment, which provides that “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.” If we are doubtful as to whether Congress possesses a certain power or not, we are to apply this simple test—Does the Constitution directly or indirectly confer the power on Congress? If not, then such a power belongs to the individual States or the people, not to Congress. Applying this to commerce entirely within a State we find that the Constitution does not grant the authority over such trade to Congress. Accordingly that power is reserved to the State. But oftentimes national and State trade are so closely mingled that it is impossible for Congress to regulate the former without including the latter. This is notably the case in the national laws on navigation and railroads. In the decision on the *Daniel Ball*, 10 Wallace, 557; 1870, an important principle was fixed in this problem. The *Daniel Ball* was a steamer navigating the Grand River in the State of Michigan between Grand Rapids and Grand Haven. It did not pass out of the State but was engaged in transporting merchandise and passengers between those places. The question arose whether under such circumstances it must be licensed or inspected under the laws of the Federal government. Its owners claimed that it need not secure such a license since it was engaged solely in intrastate trade within the boundaries of Michigan, but the government contended that the Grand River was a navigable water of the United States and that the steamer transported merchandise which was consigned to ports and places outside the State so that the transportation by steamer was only one link in a chain of interstate trade, much of the goods in question being taken from the steamer and carried to its destination outside the State. The Supreme Court decided that the steamer must conform with the Federal inspection and license laws, on the ground (1) that the Grand River was undoubtedly an avenue of interstate trade; (2) The merchandise and passengers carried by the boat did in many instances pass on from the State of Michigan directly to other States after leaving the vessel, so that the vessel's passage was in reality only one part of a general interstate shipment. On these grounds it was to be considered an agency of interstate commerce, and as such, subject to the Federal regulation. This decision estab-

lishes the rule that even an agency of intrastate carriage is subject to Federal regulation if its transport forms part of an interstate system.

**Federal Control Extended.**—A further advance in this doctrine is recorded in the case of *Baltimore and Ohio v. Interstate Commerce Commission*, 221 U. S. 612; 1911. Here Congress had by the Act of March 4, 1907, fixed a maximum of sixteen hours of work daily for employees engaged in interstate railway labor, in order to protect the lives and safety of passengers and property. The law also required interstate companies to report to the Interstate Commission the number of hours of work of their employees. The Baltimore and Ohio objected on the ground that many of its employees were engaged in both intra and interstate commerce and that Congress could not regulate the hours of labor or require reports concerning these hours in intrastate trade, because Congress had no authority under the Constitution to regulate intrastate matters. If this contention of the railway had been accepted by the Court a Federal limitation of hours of labor would have been impossible since all the railways practically require duties in both inter and intrastate trade of their employees and the whole question would thus have escaped the authority of Congress. But the Supreme Court in a decision rendered by Justice Hughes declared that where Congress has been given the undoubted authority to regulate interstate relations of employer and workman, it may exercise this power even in cases where the workman is likewise engaged in intrastate duties. "And thus many employees who have to do with the movement of trains in interstate transportation are, by virtue of practical necessity, also employed in intrastate transportation. This consideration, however, lends no support to the contention that the statute is invalid. For there cannot be denied to Congress the effective exercise of its constitutional authority.—The fundamental question here is whether a restriction upon the hours of labor of employees who are connected with the movement of trains in interstate transportation is comprehended within this sphere of authorized legislation. This question admits of but one answer.—If then it be assumed, as it must be, that in the furtherance of its purpose Congress can limit the hours of labor of employees engaged in interstate transportation, it follows that this power cannot be defeated either by prolonging the period of service through other requirements of the carriers or by the commingling of duties relating to interstate and intrastate operations." This decision shows that in its efforts to protect, control and regulate national commerce the Federal government is free to defend such commerce from all the actual dangers which threaten it and that its protective measures may extend in a practical way even to the control of State trade where such comes in contact with the national commerce.

**The Minnesota Rate Cases.**—We have to note also the decision

on the other side of the line in the celebrated **Minnesota Rate** cases. In this important controversy the State of Minnesota through its railway commission had lowered freight rates on hauls entirely within the State, by about 20 per cent. Since a number of transcontinental lines traversed the State of Minnesota it was found that the lowering of rates within the State resulted in the reduction of freight rates on interstate hauls passing through the commonwealth. Accordingly the Great Northern and other interstate roads brought suit to prevent the execution of the Minnesota Commission's orders and claimed that the commission as a State authority was in effect changing interstate rates and thereby interfering with the rate system which had been approved by the national authorities. This, if proven, would be a State obstruction or interference with interstate trade, and would be unconstitutional. In the Circuit Court, Judge Sanborn ruled in favor of the railways against the State commission, claiming that no State could regulate interstate rates and that such would be the immediate and necessary effect of the State commission's reduction of intrastate rates. On appeal to the Supreme Court that body decided in 1913 that the State authority was constitutional so long as it was restricted to rates within the State and so long as it did not reduce these rates to such a low point that the railways were unable to earn a reasonable return upon their investment.<sup>1</sup> The decision is a momentous one, opening up as it does the possibility that unless the Federal authorities act any State commission may directly and necessarily change the through rates on the transcontinental lines passing through its territory, by the simple device of lowering local rates within its own boundaries.

**The Shreveport Case.**—The Minnesota case left unanswered the important question whether local rates fixed by a State commission in such a way as to affect and influence national trade, could be changed by the Federal commission. This point has been settled in *Houston Railway Company v. U. S.*, decided June 8, 1914, known as the Shreveport case. Here the Texas railroad commission had arranged certain local rates in such a way as to favor Dallas and Houston, Texas, as distributing centers, giving these points low rates to the surrounding territory. It had also established high rates from the eastern boundary to the interior of the State in order to bar out shipments from Shreveport, Louisiana. Shreveport aimed to be a distributing centre rivaling Houston and Dallas for the trade of the intermediate district. Could the Federal authorities prevent this discrimination? On March 11, 1912, the interstate commerce commission, at the request of the Louisiana railroad commission and the Shreveport mercantile interests, ordered the railways to reduce the through rates in question *to the same basis that they charged under similar conditions on hauls within the State of Texas*. To this the railways objected claiming that the national

<sup>1</sup> *Simpson v. Shepard*, 231 U. S., 1913.

government had no authority over rates within a State and could not control the *relation* between State and interstate charges. The Supreme Court, however, held that any unjust discrimination such as existed against Shreveport, Louisiana, could be remedied by Federal action and that the proper method of doing this was to establish a reasonable *relation* between the inter and intrastate rates. The commission had done no more than this, and while it had no authority whatever to regulate intrastate charges so long as they affected only local traffic, it could constitutionally fix the relation between these charges and those on interstate traffic over the same lines. The Court pointed out that when the Federal authorities acted on such a relation of rates, their authority was supreme. "It is to be noted—as the government has well said in its argument in support of the commission's order—that the power to deal with the relation between the two kinds of rates, as a relation, lies exclusively with Congress. It is manifest that the State cannot fix the relation of the carrier's interstate and intrastate charges without directly interfering with the former, unless it simply follows the standard set by Federal authority."

The principle of Federal authority over State commerce when mingled with national trade, was more firmly fixed by the decision in *Southern Railway v. United States*, 222 U. S. 20; 1911. The Federal Safety Appliance Act of 1903 required that safety brakes and couplers should be placed on all trains, locomotives, tenders, cars, etc., used on any railroad engaged in interstate commerce and on all other locomotives, cars, etc., "used in connection therewith." The Southern Railway in 1907 had operated three cars with defective couplers, in intrastate traffic but had moved them on a line which was also used by interstate trains, thereby violating the provision of the Act. In the prosecution which followed the Railway argued that Congress had no authority to regulate intrastate cars, but the Supreme Court decided that when such cars traversed an avenue of interstate trade they became subject to Federal regulation because of the danger which they threatened to such trade. The Supreme Court, through Justice Van Devanter, said: "We come, then to the question whether these acts are within the power of Congress under the commerce clause of the Constitution, considering that they are not confined to vehicles used in moving interstate traffic, but embrace vehicles used in moving intrastate traffic. The answer to this question depends upon another, which is, Is there a real or substantial relation or connection between what is required by these acts in respect of vehicles used in moving intrastate traffic and the object which the acts obviously are designed to attain, namely, the safety of interstate commerce and of those who are employed in its movement? Or, stating it in another way, Is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad, as to *make it certain that the safety of the interstate traffic and of those*

who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intrastate as well as to those used in moving that which is interstate? If the answer to this question, as doubly stated, be in the affirmative, then the principal question must be answered in the same way. And this is so not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce.

"Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car, and when this is not the case the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen, and like employees, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent, for whatever brings delay or disaster to one or results in disabling one of its operatives is calculated to impede the progress and imperil the safety of other trains. And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train but to others."

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#### QUESTIONS

1. Explain why government regulation of business is demanded by consumers.
2. Show why it is also demanded by investors and producers.

3. Give some idea of the way in which the Federal power to regulate commerce touches the various interests of the people.
4. Explain the meaning of the word "commerce" as used in the Constitution.
5. Show how the meaning of the word has been enlarged by modern inventions and discoveries.
6. Does it include manufacturing? Cite an authority.
7. Outline briefly the general methods and kinds of regulation adopted by Congress.
8. Could Congress regulate a company which has its factory in Philadelphia and ships its goods to San Francisco and Seattle? Reasons.
9. Could Congress regulate the manufacture of the goods in Philadelphia? Reasons.
10. Mention several prominent companies whose business is now or could be constitutionally regulated by Congress.
11. Explain what a rebate is and why it is prohibited by the interstate commerce act.
12. Give a brief summary of the most important powers of the interstate commerce commission.
13. Mention several forms of discrimination practiced on the railways in the past and explain the authority of the commission to prevent such discrimination under the present laws.
14. Explain the chief causes of railway discrimination between cities and districts. Why are the railways often forced to give such discriminations against their will?
15. What power has the interstate commerce commission over this situation?
16. John Doe tries unsuccessfully to secure a rebate from the railway, but is refused. Richard Roe secures a special rate lower than the published rate, but is given no rebate. Thomas Jenkins accepts a free pass from the railway, in return for which he ships freight over the railway's line. State all of the parties who have violated the law. Explain fully.
17. Is it legal for a large shipper of fruits to secure a lower charge for icing the refrigerator cars which he hires from a private car company, than is paid by other fruit growers shipping over the same line?
18. What is misdescription? Is it an offence by the railway or the shipper? Is it legal? Explain.
19. Explain the importance of car supply in modern coal mining or in other industries. If a coal operator does not secure his proper proportion of cars what redress has he?
20. May a railway give any preference whatever to a shipper or to any kind of traffic or to any locality? Explain fully.
21. What is the long and short haul clause?
22. How does it affect the rates west of the Missouri River?
23. How does the interstate commerce law provide for the quicker settlement of disputes?
24. What was the Commerce Court? Why was it established and why abolished?
25. Has the commission regulative power over anything besides railways?
26. Give some idea of the business transacted by the commission.
27. What are your impressions as to the success of the commission's regulation of rates?
28. Outline the proposal to extend the commission's authority over water rates and explain why it is proposed.
29. What authority has the government over interstate railway labor strikes and disputes?
30. Outline the Railway Arbitration Act and explain its practical results.
31. Does the Constitution give Congress any power over intrastate trade?
32. A steamer is plying the waters of the Little River, carrying merchandise and passengers who are destined from one State to another, but the steamer itself only transports them from one point to another within the same State.



The river opens into a large lake part of which lies in another commonwealth. Under these circumstances would the national navigation and license laws apply to the steamer?

33. Congress passes a law forbidding interstate railways to keep their employees at work more than sixteen hours in any one day. The purpose of the act is greater safety on interstate lines. Could a railway which is subject to the act employ its workmen for fifteen hours on interstate work and then two hours on local business in intrastate trade? Explain the reasons and cite a precedent.

34. A Federal act provides that safety brakes shall be placed on all trains used in connection with interstate commerce. An interstate line operates these cars without such brakes locally in its intrastate business and in doing so moves them over a part of its interstate line. Would the application of the Federal act to these cars be constitutional? Reasons. Cite an authority.

35. A State railway commission fixes high rates from the State boundaries to interior points in order to keep out trade from the outside and low rates between interior points, in order to promote local trade. Can the interstate commerce commission interfere with this system in such a way as to promote outside trade into the State? Reasons and authority.

36. Prepare an essay on—"The Need for and Results of Federal Railway Regulation."

## CHAPTER VII

### POWERS OF CONGRESS—Continued

#### THE SHERMAN ANTI-TRUST ACT

**Purpose and Provisions.**—The second step in our national policy of regulation corresponded to the popular belief that trusts, combinations and monopolies were evils in themselves, and should be abolished by law. This thought lies at the basis of the now celebrated Act of 1890, known as the Sherman law, which provides as follows:—

**Sec. 1.** "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment, not exceeding one year, or by both said punishments, in the discretion of the court.

**Sec. 2.** "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

**Sec. 3.** "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

**Sec. 4.** "*The several circuit (now district) courts of the United States are hereby invested with jurisdiction to prevent and restrain*

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of this act; and it shall be the duty of the several district courts of the United States, in their respective districts, under the direction of the attorney general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Section 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the interests of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

Section 6. Any property owned under any contract or by any individual or pursuant to any conspiracy (and being the subject matter mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, or imported into the United States, and may be seized and removed by like proceedings as those provided by law for the seizure, removal, and condemnation of property imported into the United States contrary to law.

Section 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything prohibited or declared to be unlawful by this act, may sue therefor in any [district] court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him so sustained, and the costs of suit, including a reasonable attorney's fee.

Section 8. That the word 'person,' or 'persons,' whenever used in this act shall be deemed to include corporations and associations not authorized by the laws of either the United States, or of any of the Territories, the laws of any State, or the laws of any foreign country."

**Now the Sherman Act Apply to Manufactures?**—For many years the Sherman Act lay dormant upon the statute books. It was passed in response to a vague but strong popular sentiment, the meaning was indefinite and its possible interpretation was the first question that came up under the law—does it apply to combinations of manufacturers? The decision in *United States v. E. C. Knight Sugar Refining Company*, 156 U. S. 1 (1895) was, as we have seen, that the law was designed to

apply to *commerce* not manufactures, that manufacturing did not lie within the control of Congress and that a combination of sugar refiners, even though it were made to form a monopoly, was not a violation of the law unless these same refiners or manufacturers attempted also to monopolize interstate commerce in sugar.

The Knight case has been greatly misunderstood although the principle which it decides, that manufacturing is not commerce, is comparatively simple. This by no means implies that a manufacturing company, which also engages in interstate trade by selling its products across State lines, is exempt from the provisions of the act. This was the essential point of the decision in *Swift et al. v. United States*, 196 U. S. 375; 1905. In this suit the Government accused a number of meat packing concerns, situated in Chicago and other points, of a combination in restraint of trade and asked the Federal court to grant an injunction forbidding the continuance of the combine. The Government maintained that the packers had agreed (a) not to bid against each other in purchasing live stock; that they thereby kept down the price of steers in the open market; (b) that they had raised prices temporarily in order to induce large numbers of shippers to consign heavy shipments of cattle to the stock yards in Chicago and other cities; after a great number of steers had been so received in the yard the representatives of the packing companies by agreement refused to buy, thereby causing a heavy fall in prices and enabling their companies to buy in the entire supply at a greatly reduced rate; (c) that the companies had conspired together through their representatives at various retail points to fix the prices of fresh meats to the retailers; (d) that they also by agreements, had arranged uniform terms of sale to the retailers and that certain retailers who had refused to conform to these terms were blacklisted by all the companies and thereby prevented from obtaining adequate supplies of fresh meat; (e) that the companies had also agreed together to charge a uniform scale of cartage fees, this scale being so high as to form a heavy and improper burden upon the retail trade; (f) that they had entered into conspiracies with the railways and thereby secured lower freight rates on their products than were granted to their competitors. The lower court held that these acts constituted restraint of trade and it accordingly granted the injunction. The packers appealed to the Supreme Court which considered the case in a lengthy opinion and decided that the various acts above mentioned were a combination in restraint of trade and would accordingly be a violation of the law. The injunction was upheld and the principle established that combinations not to compete or to impose oppressive terms and conditions upon buyer or seller, were contrary to the Sherman Act.

*The Act Applied to the Railways.*—The next two problems, which arose together, were: Does the Act apply to railways also, and is it intended to prohibit only *unreasonable* combinations in restraint of trade, such as those forbidden by the E.

of these questions came before the Court in the case of the United States *v.* Trans-Missouri Freight Association, 166 U. S. 290; 1897. This Association was a combination of several western railways formed for the purpose of fixing charges on competitive freight traffic west of the Missouri River. The agreement did not prevent the railways from competing with each other by offering better service, but only fixed a minimum rate below which the railways forming the association were not to bid in seeking freight traffic. When prosecuted under the Sherman Act the association claimed that the trust law was not intended to cover the railways, since they were already subject to the Interstate Commerce Act, which amply protected the shipper and the general public, and prevented unreasonable freight rates. They contended further that the whole purpose of the Sherman Act was to suppress industrial and commercial combinations, which had been formed to exploit and oppress the consumer, whereas the entire question of railway rates had been separately confided by Congress to the Interstate Commerce Commission. This argument, though very strong, was not upheld by the Court. On the contrary, it ruled that the Sherman Act was intended to apply to all combinations in restraint of interstate trade, whether composed of commercial concerns or of railways, and that the Act supplemented the existing railway laws by adding new and stringent provisions forbidding restraint of trade.

On the question of reasonableness of the combination the argument of the defence was even stronger. It was shown that the main purpose of the Association was to prevent ruinous cutting of freight rates. The disastrous rate wars which so demoralized and injured the railway business, drove many companies into bankruptcy and eventually injured the shipper himself by making the railway weak, inefficient and less able to offer the facilities needed. In order to avoid these devastating conflicts between the carriers some union of the competitive interests must be formed to fix a minimum charge which all lines would observe. This, the Association urged, had been its work and its reasonableness and even necessity could not be doubted by anyone familiar with transportation conditions. But the Supreme Court refused to accept this view. Although four of the Justices dissented from the opinion, the majority held that the Sherman law forbade *every* agreement or combination whether reasonable or unreasonable, if formed to restrict competition in interstate commerce. The Court ruled that the words, "*Every* agreement, in restraint of trade" were conclusive. This decision was reaffirmed and strengthened in the Joint Traffic Association case, 171 U. S. 505; 1898, in which the eastern traffic lines were prohibited from making a similar agreement because it would restrain competition among the lines concerned. The rule was later modified in the Standard Oil and American Tobacco cases described below.

**Local Exchanges Dealing in Interstate Products.**—The fourth question is: Does the law prohibit an exclusive combination of local dealers known as an "exchange" where the members deal in cattle which may have been shipped in from another State? In the cases of *Hopkins v. United States* and *United States v. Anderson*, 171 U. S. 578 and 604; 1898, the legality of the Traders' Live Stock Exchange of Kansas City was disputed. An agreement among purchasers of cattle for the purpose of regulating and controlling the local business among themselves had been entered into, and one of the rules provided that the members of the Exchange should not deal with any yard trader who was not a member of the Exchange. The Supreme Court upheld the legality of such an Exchange under the Sherman law, declaring "there is no evidence that these defendants have in any manner other than by the rules above mentioned hindered or impeded others in shipping, trading, or selling their stock, or that they have in any way interfered with the freedom of access to the stock yards of any and all other traders and purchasers, or hindered their obtaining the same facilities which were therein afforded by the stock yards company to the defendants as members of the Exchange, and we think the evidence does not tend to show that the above results have flowed from the adoption and enforcement of the rules and regulations referred to." The Court seemed to feel that any burden which the Exchange placed upon trade was so slight and so indirect as to be entirely negligible.

Closely related to the Live Stock Exchange cases is the decision in *Board of Trade of Chicago v. Christie Grain & Stock Company*, 198 U. S. 236; 1905. Here the Board of Trade had made contracts with telegraph companies by which it furnished quotations of the transactions in the wheat, grain and provision pits of the Board to the telegraph companies, to be distributed to members and subscribers, with the explicit understanding that the telegraph companies would not furnish these quotations to any bucket shop or place where they would be used as a basis for bets or illegal contracts. The telegraph companies submitted applications for these quotations to the Board for investigation. The Christie Company secured the quotations in some way not disclosed. The Board of Trade asked for an injunction against the Christie Company on the ground that the latter was using the property of the Board namely its quotations, wrongfully, and without authorization. The Christie Company answered that the contract between the Board and the telegraph company to restrict the quotations was an agreement in restraint of interstate trade, since the quotations covered transactions of national commerce. The defendant claimed that the true purpose was to exclude all persons who did not deal through members of the Board of Trade. The Federal Supreme Court, however, ruled that the evidence showed "a scheme to exclude bucket shops as shown and proclaimed, and the defendants called this an attempt at a monopoly in bucket shops. But it is simply a restraint on the

acquisition for illegal purposes of the fruits of the plaintiff's work." Accordingly an injunction was granted forbidding the Christie Co. to use the quotations in the unauthorized way mentioned.

**Agreements not to Compete.**—Fifth, is an agreement between various producing, trading companies not to compete on city contracts, prohibited by the Act? This interesting and important question was decided in *Addyston Pipe Co. v. United States*, 175 U. S. 211; 1899. It was proven that six different shippers located in various States had combined in a pool to control the manufacture and sale of cast iron pipe. They agreed to maintain prices, at the same time keeping up a show of public competition in supplying city governments by making separate bids for contracts but offering these bids in such a way as to prevent any real competition between the concerns in the pool. The various companies agreed in advance as to which should secure the contract; this concern bid low and its fellow members in the agreement bid high. The Court held this to be a combination in restraint of interstate commerce in the sense of the Sherman Act and therefore illegal. Although a monopoly of manufacturing was not illegal, an agreement to suppress competition in the interstate *sale and shipment* of an article was forbidden by the law. A similar point arose in *Montague & Co. v. Lowry*, 193 U. S. 38; 1904. A number of manufacturers and dealers in tiles, mantels and grates in California and other States had formed a combination by which: first—dealers would not purchase materials from manufacturers who were not members of the Association. Second—dealers and manufacturers would not sell tiles for less than official list prices to persons not members of the Association; members to receive a discount of 50%. Membership was fixed by certain rules, one of which provided that the applicant must carry \$3000 worth of stock. An outside firm, not a member of the Association and not carrying \$3000 worth of stock, finding its business injured by the agreement, brought suit for damages under the Sherman Act. The Court held that the combination was in substance an agreement to restrain trade between the States, in that it was intended and did prevent the free and unrestricted purchase and sale of goods and obstructed the business of those who were not members, that it was forbidden by the Act and that the injured party could recover three times the actual damages caused by the combination.

**The Holding Company.**—The sixth question arising under the law was: Can a "holding company" be formed to own and control the stock of several competing companies? This question first arose in the merger of certain railway lines leading to the Northwest notably the Great Northern and Northern Pacific. In order to accomplish this merger the Northern Securities Company was formed and purchased the stock control of each of the two competing lines mentioned. The merger was attacked in the *United States courts* and in 1904 was declared illegal by the Supreme

Court in *Northern Securities Company v. United States*, 193 U. S. 197; 1904, on the ground that it brought about by indirect but effective means the suppression of competition between the Northern Pacific and Great Northern Railways. The Court declared that even though such competition was not immediately suppressed as a result of the merger, yet the possible suppression and the evident attempt to secure it were sufficient grounds to render the merger illegal. The Court therefore ordered that the stock of the two companies be distributed proportionally among the share holders in the Northern Securities Company.

The great turning point in the interpretation of the Act came in 1911, when the question of the legality of the holding company was again presented in the famous Standard Oil case, *Standard Oil Co. v. U. S.*, 221 U. S. 1; 1911. The issue here was at root a simple one. The Standard Oil Company of New Jersey with \$100,000,000 capital was a holding corporation which owned the stock control of nineteen subordinate and previously independent companies engaged in the manufacture, transportation and sale of petroleum and its products. In 1906, a government suit was brought to dissolve the combine, as a violation of the Sherman Act. The government contended that the holding company was a device by which the Standard Oil interests had suppressed all competition among the various subordinate concerns. The Circuit Court adopted this view and declared the Standard Oil Company of New Jersey to be a combination in restraint of trade. An appeal was taken to the Supreme Court and in May, 1911, that tribunal upheld the decision and required the Standard Oil Company to dissolve its combination with the subsidiary companies within six months. The Court however declared that the mere existence of a combination in commerce is not always illegal unless it involves a clearly proven plan to restrain trade and competition. The courts must therefore decide "in the light of reason" in each case whether the combination complained of is intended to destroy competition and to make use of illegitimate means of expanding its business or whether, on the other hand, it is an honest and legitimate attempt to introduce economies, uniform systems and methods and the benefits of large scale management, and involves only such restraint of trade as is natural and reasonable. In the latter case it is not a violation of the Sherman Act. The Tobacco case, *U. S. v. American Tobacco Company*, 221 U. S. 106; 1911, while slightly different in form, involved the same legal principle. The tobacco company together with its accessory concerns controlled several subsidiary and previously competitive companies and thereby directed their policy. Owing to its aggressive methods in attempting to destroy competitors it was prosecuted in 1906 under the Sherman Act and after an appeal to the Supreme Court, it too was declared to be a monopoly in violation of the Act. The Court ordered a reorganization of the companies involved in the combination, within eight



months, failing which a receiver would be appointed to wind up their affairs. The Oil and Tobacco decisions are of value because they permit the forming of combinations based on greater efficiency, but forbid the destructive and extortionate combination whose sole purpose is to smother competition in order to squeeze higher prices. This principle is the much discussed "rule of reason" set forth in both decisions. The rule is simply expressed by the question—"what is the purpose and effect of the combine?" If the injured complainant or the public prosecutor can produce evidence showing a destructive or extortionate intention or effect on the part of the combination, the law has been violated, and the combine may be dissolved by order of the court, its leaders fined and imprisoned, and injured parties may recover three times the damages suffered.

**The Rule of Reason Applied.**—The rule of reason was still more clearly presented by the decision in *United States v. Terminal R. R. Association of St. Louis*, 224 U. S. 383, 1912, which applied the law to an entirely different set of conditions. In 1889, Jay Gould had formed the St. Louis Railroad Terminal Association, composed of several railways entering the city, for the purpose of acquiring and developing terminal facilities for the common use of the carriers. The agreement provided that the terminal company should be controlled by the Board of Directors, one director from each of the proprietary companies owning the terminal stock. New members should be admitted to the association only with the unanimous consent of all the proprietary companies and upon payment of such a consideration as the directors might determine. In order to prevent future competition and to insure a monopoly of the avenues of entrance to the city each railroad had to agree to use only the terminal company's facilities in entering St. Louis. Each line must also agree not to build its own bridges and tunnels nor establish its own ferries into the city. The terminal company gradually secured by purchase or lease all the facilities, bridge approaches and ferries crossing the Mississippi River at that point and acquired complete control of all the terminal entrances and exits of the St. Louis region. In doing so it established its own rates for the territory under its control and allowed none of the entering lines to bill their freight or passenger traffic to St. Louis proper, but required them to bill to East St. Louis on the Illinois side of the river, and thence the terminal company rebilled to St. Louis. The attorney general having begun a prosecution against this combination as being in restraint of trade under the Sherman Act, and the case coming to the Supreme Court, that tribunal declared that the economic advantages to the city and to the railway lines from the unification of terminal facilities was clear and undoubted; that it was neither advisable nor profitable to the city or the railways to *have a complete duplication of such facilities for each railway because of the prohibitive cost of bridges over the river and tunnels through the high river banks.* In spite of this undoubted economic

advantage, however, the court found that the original terminal company had purchased its two chief competitors, the Wiggins Ferry Company, which operates a line of freight ferries across the river and the Merchants Bridge Company, which owned the largest bridge open to all entering railway lines, and that the terminal company had made these purchases as a means of extending its control and preventing competition. The court declared this combination to show an intent or purpose to restrain trade across the river and to be a violation of the Sherman Act in this respect. To the answer made by the defendants that all the various railways entering the city might be allowed by the terminal company to use its facilities upon payment of a suitable charge and that the terminal association was in effect only the bona fide agent of the various railways and was employed for the purpose of collecting and distributing their freight and connecting their lines with the distributing points in the city, the court made answer "plainly the combination which has occurred would not be an illegal restraint under the terms of the statute if it were what is claimed for it, a proper terminal association acting as the impartial agent of every line which is under compulsion to use its instrumentalities" . . . . but declared that the company by its restrictive rules had shown that it was not an impartial agent. The Court ordered (1) the admission of any other railway to the terminal association upon equal terms with other proprietary companies and the abolition of the unanimous consent clause. (2) The use of the facilities of the terminal association on fair and reasonable terms by companies which do not wish to become proprietors or joint owners or members of the association. (3) The proprietary companies must not be restricted or required to use only the terminal company's facilities for entering St. Louis as provided in the agreement. (4) The practice of billing to East St. Louis and rebilling thence to St. Louis must be abandoned as an unnecessary restraint of trade. (5) Arbitrary discriminatory charges must be amended. (6) Disputes between the terminal company, the proprietary companies and any other company desiring to become a user or joint owner of its facilities are to be submitted to the District Court. (7) If the parties in interest fail to provide a suitable plan for approval under the orders above mentioned the terminal association is to be dissolved into its three original companies—the Wiggins Ferry Company, the Merchants Bridge Company and the original Terminal Company. This decision is of much importance because it marks a further step towards the "reasonable" interpretation of the Sherman Act and shows the willingness of the court to allow an advantageous combination to stand, providing its oppressive and discriminatory features are eliminated. It also shows (what has sometimes seemed doubtful) that the court intends to enforce the exact purpose of the Act as originally understood.

*The Labor Boycott.*—A new and difficult question arose in 1908—

does the law apply to an interstate labor boycott? A labor boycott is an agreement by laborers and their sympathizers to refuse to buy goods from, or to trade with another party, usually an employer. The law has been invoked in two celebrated labor disputes of national scope; the case of the Danbury hatters and that of the Bucks Stove and Range Company of St. Louis. In the former case the United Hatters of North America were attempting to force the fur felt hat manufacturers of the country to employ only union labor. Extensive and costly conflicts had been waged by the union against those manufacturers who refused the demand. The Loewe Company of Danbury, Conn., had established union conditions of pay and hours in its shop, but would not grant the demand to employ only union members and discharge the non-union men. Thereupon a strike was called in the company's shops in Danbury, and a boycott established which gradually expanded under the direction of the United Hatters and with the assistance of the American Federation of Labor until it finally reached national proportions. The Loewe Company proved over \$70,000 of loss to its interstate trade and sued the members of the union for damages under the Sherman Act. The Federal courts declared that the act did apply to such cases and awarded damages to the company. In the Bucks Stove Company a dispute had arisen as to the hours of labor and after repeated efforts by both sides to settle the controversy, hostilities were opened by the declaration of a strike and boycott of Bucks stoves. This movement was started by the local union of metal polishers and buffers; it was taken up by the national union and aided by the American Federation of Labor. It soon reached such an extensive scale that the company suffered heavy losses. Instead of asking for damages, however, it was decided to apply for an injunction preventing the further continuance of the boycott as a violation of the Sherman Act. The court granted this injunction on the ground that the boycott was a restraint of trade between the States. These two decisions *Loewe v. Lawlor*, 208 U. S. 274, 1908 and *Bucks Stove and Range Company v. Gompers, et al.*, 221 U. S. 418, 1911, established the principle that the Sherman Act applied to combinations of labor as well as of capital formed for the purpose of restraining trade between the States. The labor unions at once brought to bear upon the two major political parties a strong influence to have the law amended so that it would not apply to boycotts. This attempt succeeded in 1914, when an amendment was attached to the Clayton Act legalizing the boycott. Section 20 of this Act provides that no injunction or restraining order shall prohibit any person or persons, whether singly or in concert, from striking or persuading others to do so, in a dispute concerning the terms or conditions of employment, "or from ceasing to patronize or to employ any party to such a dispute, or from recommending, advising or persuading others by peaceful and lawful means so to do; . . . nor shall any of the acts

specified in this paragraph be considered or held to be violations of any law of the United States."

The effect of this section is to legalize the boycott of employers in any labor dispute affecting interstate commerce, so far as the Federal laws are concerned. Former President Taft in his Address to the American Bar Association, 1914, pointed out that the opening words of Section 20 of the Clayton Act applied to cases "between employers and employees, or between employees, or between persons employed and persons seeking employment" and that accordingly an injunction to prevent a boycott waged against *outsiders* such as other employers and dealers in no way connected with the dispute could legally be granted by the courts. He is therefore of the opinion that where employees punish other persons with a boycott unless these other persons will refuse to join the employees in their boycott, an injunction may be secured to protect such *outsiders* from injury to their property rights.<sup>1</sup>

**Retailers versus Wholesalers.**—Is an agreement between retailers to circulate a blacklist containing the names of certain obnoxious wholesalers, a violation of the Sherman Act? In *Eastern States Retail Lumber Dealers' Association v. U. S.*, 234 U. S. 600, 1914, this difficult problem was finally settled by the highest Federal tribunal. The defendant companies were large associations of lumber retailers in the middle States and New England. They had agreed to circulate an "official report" to their members containing a list of names of wholesalers who had sold lumber direct to the customers of the retailers and thereby entered into active competition in the retail trade. This report contained, among other factors, the following statement: "You are reminded that it is because you are members of our Association and have an interest in common with your fellow members in the information contained in this statement, that they communicate it to you; and that they communicate to you in strictest confidence, and with the understanding that you are to receive it and treat it in the same way.

"The following are reported as having solicited, quoted, or as having sold direct to the consumers:

(Here follows a list of the names and addresses of various wholesale dealers.)

"Members upon learning of any instance of persons soliciting, quoting, or selling direct to consumers, should at once report same, and in so doing should, if possible, supply the following information:

"The number and initials of car.

"The name of consumer to whom the car is consigned.

"The initials or name of shipper.

"The date of arrival of car.

"The place of delivery.

"The point of origin."

<sup>1</sup> See *Proceedings American Bar Association, 1914.*

The retailers' associations claimed a right to distribute such information to their members and it was admitted that the natural tendency of the blacklist or official report was to cause retailers receiving such reports to withhold patronage from the concerns named on the list. Such was in fact the very object of the associations in circulating the report. The Supreme Court held, pursuant to the general principles laid down in the Standard Oil case, that the broad, general purpose of such a combined act was to restrict interstate trade and to lay burdens upon the wholesalers, which would prevent them from entering into active competition in the retail business, should they choose to do so. "Here are wholesale dealers in large number engaged in interstate trade upon whom it is proposed to impose as a condition of carrying on that trade that they shall not sell in such manner that a local retail dealer may regard such sale as an infringement of his exclusive right to trade, upon pain of being reported as an unfair dealer to a large number of other retail dealers associated with the offended dealer, the purpose being to keep the wholesaler from dealing not only with the particular dealer who reports him, but with all others of the class who may be informed of his delinquency."

The defendants had argued that they had entered into no agreement or conspiracy to boycott any wholesaler and that they had a legal right to circulate any information which they chose among their own members. In rejecting this plea, the Supreme Court went to the farthest limit yet reached in its interpretation of the Sherman Act. "It is elementary, however, that conspiracies are seldom capable of proof by direct testimony, and may be inferred from the things actually done; and when, in this case, by concerted action the names of wholesalers who were reported as having made sales to consumers were periodically reported to the other members of the associations, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred.

"The circulation of these reports not only tends to directly restrain the freedom of commerce by preventing the listed dealers from entering into competition with retailers, as was held by the District Court, but it directly tends to prevent other retailers who have no personal grievance against him, and with whom he might trade, from so doing, they being deterred solely because of the influence of the report circulated among the members of the association. In other words, the trade of the wholesaler with strangers was directly affected, not because of any supposed wrong which he had done to them, but because of the grievance of a member of one of the associations, who had reported a wrong to himself, which grievance, when brought to the attention of others, it was hoped would deter them from dealing with the offending party. This practice takes the case out of those normal and usual agreements in aid of trade and commerce which may be found not to be within *the Act*, and puts it within the prohibited class of undue and un-

reasonable restraints, such as was the particular subject of condemnation in *Loewe v. Lawlor*, 208 U. S. 274, 300.

"The argument that the course pursued is necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities is answered by the fact that Congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted." This decision renders illegal not only an agreement among dealers to boycott wholesalers who attempt to sell direct to consumers; it also forbids even the circulation of information which may be used in such a boycott where there is no express agreement to conduct the boycott itself, but where in the eye of the court the apparent purpose was to withhold trade from the firms named in the circulated list.

**The Corner in Staple Products.**—Is a "corner" a violation of the Sherman Act? This seventh problem goes to the root of the protection which the law offers to the consumer. A "corner" may be generally defined as the purchase of a large supply of a product with the purpose of withholding it from trade and thereby artificially manipulating the price. In 1910 James A. Patten and others were alleged by the government to have started a corner in cotton, and indictments under the criminal section of the Act were brought against them, charging them with restraint of interstate trade. It was claimed that cotton was chiefly grown in the Southern States, largely used in the North and marketed largely by sales on the New York cotton exchange, in which the dealings were so large as to determine the price for most of the country; further, that Patten's corner by withholding cotton from the manufacturers of the North would greatly enhance the price of the commodity and had already interfered with its purchase for such manufacture. Patten's attorney objected, by a "demurrer," that the acts charged against him, even if proven, were not a violation of the Sherman law. He contended that the purchase and sale of cotton was a local transaction in each State where it was made, and that it was not subject to Federal regulation and that Patten and his colleagues could buy as much of any product as they pleased without violating the law. This claim came before the Supreme Court in *U. S. v. James A. Patten et al.*, 226 U. S. 525; 1913. The important question was decided in favor of the government on all points. The court held that the widespread purchase of an article *for the purpose of withdrawing it from trade in order artificially to increase its price* was precisely one of those restraints of trade which the Sherman law was intended to prevent. It was unthinkable that a speculator could corner the cotton market without immediately restricting trade between the States, whether his purchases were *made in one State or several*. In the words of Justice Van Devanter,

who rendered the decision: "It well may be that running a corner tends for a time to stimulate competition; but this does not prevent it from being a forbidden restraint, for it also operates to thwart the usual operation of the laws of supply and demand, to withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition." The court accordingly upheld the indictment and without proceeding to further trial the defendant paid a fine. This decision has effectually put a stop to attempts to corner the interstate market in necessities of life.

**Patents and the Sherman Act.**—The eighth problem in our series has presented unusual difficulty and cannot even yet be considered as satisfactorily solved. The Constitution in Article I, Section 8 gives Congress the power "To promote the progress of science and useful arts, by securing for limited times to authors and inventors *the exclusive right* to their respective writings and discoveries." Under this authority Congress has conferred by the patent and copyright laws, an exclusive right upon authors and inventors to their respective writings and discoveries. At this point the difficulty in interpreting the Sherman Act arises. What is the relation of the "exclusive right" given by the patent laws to the monopoly forbidden by the Sherman Act? Has Congress granted to the inventor a right which will enable him to sell his product in interstate trade *under such terms as he pleases*? Can he make agreements with wholesale and retail stores binding them in turn to sell only on his terms? Can he fix not only the price at which he sells but also the price at which the wholesaler and retailer will market the product? Can he use his patent monopoly right to establish a monopoly in other articles not patented? Can the manufacturer who produces an unpatented article by a secret formula or process, attempt to control its retail sale price? Can a publisher dictate terms of retail sale to a retailer? All these and similar practical questions are now coming before the courts for settlement under the Sherman Act and they touch on some of the most widely used practices in manufacture and merchandising. One of the first cases in this field was that of the electric lamp combine. It was claimed by the government that several electric manufacturing companies had agreed to secure a monopoly of ordinary carbon electric lamps through their control of the patents for tungsten lamps. The latter were a superior grade in great demand and the members of the combine agreed to sell such tungsten lamps only to purchasers who consented to buy also all their supplies of ordinary carbon lamps from the combine.

This restrictive clause—"you must buy everything or nothing from us"—is one of the most generally used means of forcing small dealers to take up exclusive relations with a trust and to drop the products of independent manufacturers. It was slowly coming

under the ban of the courts when in 1914 the Clayton Act, Section 3, made it illegal. In this case it was re-enforced by the patent right on the tungsten lamp, and the combine claimed that this patent was in itself a permissible monopoly, and enabled the patent owner to sell or refuse to sell his product under such terms as he pleased. The government contended that no matter what the patentee's right over his own product might be, he could not use it to establish an exclusive right or monopoly over a different and entirely separate article in no way connected with his own product or patent. This case never reached the Supreme Court, as counsel for the General Electric Company agreed to a court decree on October 2d, 1911, perpetually enjoining the members from continuing the combination.

**The Rotary Mimeograph Case.**—A different form of the same question came before the Supreme Court in the case of *Henry v. Dick*, 224 U. S. 1, decided 1912. Here the owner of the patent was allowed to make use of his patent right to control the sale of other articles not patented. The A. B. Dick Company controlled the Edison patents covering a certain form of rotary mimeograph, and were accustomed to sell these mimeographing machines with a restrictive clause in the sales agreement, providing that the buyer must use on the machine only certain stencil paper and inks sold by the A. B. Dick Company. Miss Christina Skou purchased a mimeograph from the agents of the Dick Company under this agreement, but afterward bought from Henry some other ink which she used on the machine. The Dick Company claimed that Miss Skou and Henry had thereby violated the Dick Company's patent rights. The ink so purchased was not covered by the mimeograph patent but the company claimed that it had a right to limit the use of its mimeograph to those persons who also used the ink which it prescribed. This claim was sustained by the Supreme Court, which declared that a patent was expressly intended to be a monopoly or exclusive right by both the Constitution and the patent laws, and this included the legal right to sell the patented articles under any conditions or terms which the owner of the patent chose. He could, for example, prescribe that it should be used only with certain materials of his own manufacture or under his own control. The effect of this decision was to enable the owners of patents to evade the Sherman law by the simple means of stipulating that their patented articles may only be purchased by persons who also buy from them and use in connection with the patented article certain other unpatented materials. By such a plan they at once secure a monopoly not only of the patented products but of all the unpatented supplies and other material which they specify in their sales contracts. In this way it would be comparatively easy for a company owning a new patent which might greatly simplify the process of manufacturing clothing, to sell its machines only to clothing manufacturers who agree to buy their buttons, braid and



cloth from the company. The whole clothing industry would thereby be placed at its mercy and a monopoly in violation of the spirit of the Sherman Act would be built up under the protection of the patent laws. The decision in *Henry v. Dick* was rendered by a vote of four to three of the justices, there being two vacancies on the Bench at the time. It was at once proposed that Congress remedy the effects of the decision by legislation to prevent the patent laws from being used as a means to build up an artificial monopoly in unpatented articles. This has now been done in the Clayton Act, which is described in a later section.

**The Sanatogen Case.**—Meanwhile the two vacancies in the Supreme Court were filled and a new patent case came up for final decision in *Bauer & Co. v. O'Donnell*, 229 U. S. 1; 1913. The question here was whether the owner of a patent medicine could, by agreement with retail dealers, fix the retail price at which his medicine was to be sold to the public. The Bauer Co. controlled a patent medicine known as "Sanatogen." Each bottle of the remedy was furnished to retailers with a notice in which the following words were contained:

"Notice to the Retailer

"This size package of Sanatogen is licensed by us for sale and use at a price not less than one dollar (\$1). Any sale in violation of this condition or use when so sold, will constitute an infringement of our patent No. 601,995, under which Sanatogen is manufactured, and all persons so selling or using packages or contents will be liable to injunction and damages.

"A purchase is an acceptance of this condition. All rights revert to the undersigned in event of violation.

"The Bauer Chemical Company."

O'Donnell was a retail druggist in Washington. He purchased of the Bauer Company packages of the Sanatogen, bearing the above notice, and sold them at less than \$1 per bottle. Since he persisted in this practice, the Bauer Co. refused to sell him further supplies, whereupon he purchased quantities from the local jobbers. The question presented to the Court was: Did O'Donnell's act in retailing at less than the price fixed in the notice constitute an infringement of the Bauer Co.'s patent? Under the *Henry v. Dick* decision the company would apparently have been entitled to recover damages from O'Donnell: but the Supreme Court, in deciding in O'Donnell's favor and denying the Bauer Co. any damages under its patent rights, declared that the Company was actually transferring the right of ownership of its product, while still attempting to reserve the right to fix the price at which the same product should be subsequently resold. The Court reasoned that neither O'Donnell nor the jobbers from whom he purchased were the agents of the Bauer Co.; they had the indisputable right to sell the article purchased without accounting to the Bauer Co. in *any way and without making any further payment than had al-*

ready been made in purchasing the medicine. In both the patent and copyright acts, said the Court, "it was the intention of Congress to secure an exclusive right to sell, and there is no grant of a privilege to keep up prices and prevent competition by notices restricting the price at which the article may be resold. The right to vend conferred by the patent law has been exercised, and the added restriction is beyond the protection and purpose of the Act. This being so, the case is brought within that line of cases in which this Court from the beginning has held that a patentee who has parted with a patented machine by passing title to a purchaser has placed the article beyond the limits of the monopoly secured by the patent act." Accordingly O'Donnell was held to have acted entirely within his rights in buying and selling the product at such a price as he chose; the patent rights of the Bauer Co. did not include the right to fix the retail sales price of their product, when sold by independent drug dealers. In this decision the four justices who had formed the majority of the Court in the *Henry v. Dick* case all voted in favor of the right to fix prices, but were overruled by the three justices who had been in the minority in the *Henry v. Dick* decision, plus the two new members of the Court, the vote being 5 to 4.

**The Publishers' Case.**—The Sanatogen decision was followed later in the same year by a similar ruling on price protection of copyrighted books, in *Straus and Straus v. The American Publishers Association and the American Book Sellers Association*, decided December 1, 1913. Here the publishers' and booksellers' associations had agreed to refuse a supply of copyrighted books to any retailers who sold below the standard price. Straus and Straus, trading as R. H. Macy & Co., a department store in New York City, persisted in the cut-price policy and were placed on what was known as the "cut off list," a printed leaflet issued by the associations containing the names of retailers to whom supplies would be refused. The Straus firm claimed that in consequence of the circulation of these lists, it had been unable to obtain its customary amounts of books and thereby suffered greatly in its book department. The publishers relied for their defence upon their copyright, which gave them the exclusive control over their books and allowed them to sell under such conditions as they chose. This defence was not recognized by the Court, which held, under the same principle as in the Sanatogen decision, that a copyright gave the publishers and booksellers no control over the book after they had sold it to the retailer; that the latter, having once purchased it, could resell it at such price as he pleased; and that the Sherman Act was designed to secure to the public the benefits of competition between the retail stores. An agreement among publishers to refuse to sell to persons who resold the books below the fixed price was accordingly a violation of the law.

**Unpatented Articles.**—The problem of price-fixing without the

element of patent rights was presented to the Supreme Court in *Miles Co. v. Park Drug Co.*, 220 U. S. 373; 1911. The Miles Medical Company manufactured a number of so-called remedies under a secret formula. It sought to protect the wholesale and retail prices of these remedies by two series of contracts with wholesalers and retailers, each of which fixed the wholesale and retail price respectively and prevented outside dealers from securing the medicines and selling them at a cut price. The Miles Company argued that these contracts made the wholesaler and retailer its employes or agents, subject to its instructions as to price and other terms of sale, and that the dealers entering into the agreement were bound by it. The Park Company, an outside dealer, had succeeded in obtaining goods by inducing one of the other wholesalers to violate his agreement; it was sued by the Miles Medical Company for damages for having induced the wholesaler in question to violate his contract. The Supreme Court declared that the Miles Company could not recover damages since the contract which had been violated was itself forbidden by the Sherman Act and was therefore illegal. The Court explains that any producer might control the manufacture of his product by a secret formula but having once sold the product he could not, under the Sherman Act, make an agreement with dealers fixing the price at which it should be sold to other persons, since such an agreement would prevent all competition in the sale of the article. "The public," declared the Court, "is entitled to the benefit of competition between wholesalers and retailers. Such competition may not be destroyed by agreement even if the agreement is made by the manufacturers of the product itself." The importance of this sweeping decision may only be realized when we grasp the magnitude of the practice of "price protection." Nearly every widely advertised article is now sold under some price protecting system or agreement. The Miles Medical Co. alone had 400 such agreements with wholesalers, and 25,000 agreements with retailers. In the future both jobber and retail merchant must be left free to market their wares under such prices as they choose. A glance at the above cases shows that they all refer to attempts made by the manufacturer to restrain or control the action of *dealers or other persons* who have bought their stocks of goods from him. In the *Henry v. Dick* case the Dick Company seeks to control the use of material with its machine after the machine has been sold, in the *Sanatogen* and *Book* cases the manufacturer, publisher and wholesaler attempt to fix the price at which the retailer shall sell after he has purchased the goods. It will be clear, however, that these rulings do not cover the sale of goods *directly by the owner through his own agents and his branch houses*. If a large manufacturer were to establish throughout the country a number of agencies, supplying these agencies with his product and not parting with the ownership of that product but *consigning it to the agents to be sold for his account*, he could

it appears, under the Sherman Act, fix the price at which every sale could be made in each of these agencies, since the goods are his own property. The law forbids only an agreement among various persons to maintain price, not the instructions by the *owner* to sell at a given price.

**Price Protection.**—Supposedly the public derives great benefit from an absolutely free competition between dealers, and the more the dealers are encouraged to cut prices, the greater the supposed benefit. We are just beginning to suspect that this reasoning is seriously mistaken. Price cutting is usually practiced by a very few shops, and these are mostly department and tobacco stores;—the management announces that on a certain day it will sell as a “leader” a certain widely advertised standard article at a cut price, each buyer is allowed to purchase only a small amount of the goods, and the total sales of the product are not allowed to go above a certain quantity each day, in order to limit any possible loss on the “leader.” The manager in this way attracts many new customers who buy other goods at ordinary prices. But the trade in the leader at all other stores is at least temporarily destroyed and the other dealers finding this to be so, cancel their orders from the manufacturer. When finally the price-cutting store shifts to another “leader” the first product is practically out of the market and its manufacturer must pocket a heavy loss. The public has gained the impression that the regular price of his article is too high. Let us examine briefly both the producer’s and the consumer’s side of this regulative question.

We must remember that the large manufacturer has changed his methods radically in the last two decades. He is now guaranteeing both the quality and the quantity of his goods, and is putting forth special efforts to create a permanent clientele by satisfying the purchaser in every detail. The very fact that he spends a fortune every year in advertising his brands makes it necessary for him to hold his customers. He no longer aims to take advantage of the trade by marketing a large quantity of doubtful goods to a temporary circle of buyers, but seeks rather to form permanent connections, a permanent trade name, and a thoroughly satisfactory standard of quality and service. This means that he takes the entire responsibility for his goods—in order to do this, he must fix a standard price which will allow a reasonable profit to the retail trade. The price cutter destroys this system, disrupts the permanent foundations of the manufacturer’s relations with the retail trade, and undermines the public confidence in the manufacturer’s fairness. If the department store could permanently sell goods at the lower price, there could be no valid objection, but it does not. The sole aim is to lure buyers by the offer of a new bargain each week. It would seem a mistaken public policy to protect by law the *momentary bargain sale* rather than the efforts of years to *build up a permanent trade* by sound and fair principles of uniform

quality, quantity and price. Rather should price protection be legalized in those cases where a moderate and fair price is fixed.<sup>1</sup> The Sanatogen decision is a clear and authoritative statement of the patent law; but it raises the question, how can beneficial and just price-fixing agreements be distinguished from those which are improper and extortionate? Shall both alike be put under the ban of the law, to the loss of the producer, the public, and the small store-keeper, or shall we attempt to separate the wheat from the chaff? Clearly the latter policy is necessary and it is this need that has led to the suggestion of a national commission to examine and approve or forbid price-fixing agreements in interstate business.

**Practical Results of the Sherman Act.**—From our examination of the Sherman Act we may now draw the following conclusions as to its practical effects upon business and as to the changes which should be made in the law itself:

First, the Act has been very properly applied to many combines which were guilty of predatory, destructive, and immoral practices. It has been a sound policy and has exerted a healthy influence to discourage business piracy. No matter how great its size, no combine should be allowed by law to destroy its competitors systematically by unscrupulous and unfair means. The leading commercial nations of the world refuse to tolerate such practices. In England, both statute and common law forbid them; in Germany also the imperial acts relative to "unlauteren Wettbewerb" prohibit the various forms of trade piracy.

Second, the act has also been applied to many combines *because*

<sup>1</sup> The need for some revision of legal rules which now forbid even reasonable price protection in standard goods has led to the formation of the American Fair Trade League with offices in New York. This society is supporting a measure known as the "Stevens Bill," the main provisions of which are as follows:—manufacturers and producers of trade-marked or specially branded goods circulating in interstate trade may contract with wholesale and retail dealers to fix a uniform price for the resale of their products provided:

(a) that the producer has not a monopoly or control of the market for articles of a similar class of merchandise and has not any agreement or combination with any competitor for the fixing of the prices of articles in the same class; provided also

(b) that the producer shall label the resale price on each article or package; such articles may then not be resold except at the price marked; and provided

(c) that the producer files in the U. S. Trade Commission a statement setting forth his trade-mark or special brand and the schedule of prices fixed by agreement with wholesalers and retailers; there shall be no discrimination in prices to dealers nor any special concession, allowance, rebate or special commission in favor of one dealer as against others; provided further

(d) that the dealers buying such goods from the producer may sell them at prices other than those marked in case the dealers retire from business or become bankrupt or the goods become damaged, but only after the dealer has offered the goods to the producer at the price originally paid for them.

It is expected that such a measure, if passed, would protect the manufacturer against bargain sale abuses and would encourage and safeguard the present system of uniform quality, quantity and prices, and in this way directly benefit the consumer.

*they were combines* or because of their size. Yet many of these have been based upon the soundest economic principles, such as introduction of uniform processes, reduction of waste, use of scientific methods, immediate adoption of new inventions, enforcement of greater steadiness in prices, etc. Such agreements tend to standardize an industry, to render it often both more efficient and more stable in its costs and prices. Here the Sherman Act should never have been applied; its chief purpose should be to prevent, not the growth of large concerns nor the unification of industries, but rather the illicit destruction of competitors. For example, the agreements for price fixing attempted in both the Sanatogen and the Miles Medical Co. cases were, in the main, for a proper purpose; viz., to fix the retail sales price of their products at a reasonable figure. On the other hand, the effort to attach onerous and burdensome restrictions in licensing and selling a patented article to the public was upheld in the *Henry v. Dick* case, although the words of Chief Justice White, who voted with the dissenting minority, would seem unanswerable. In pointing out the harmful possibilities which the decision entailed upon business, the Chief Justice said: "Take a patentee selling a patented engine. He will now have the right by contract to bring under the patent laws all contracts for coal or electrical energy used to afford power to work the machine, or even the lubricants employed in its operation. Take a patented carpenter's plane. The power now exists in the patentee by contract to validly confine a carpenter purchasing one of the planes to the use of lumber sawed from trees grown on the land of a particular person, or sawed by a particular mill. Take a patented cooking utensil. The power is now recognized in the patentee to bind by contract one who buys the utensil to use in connection with it no other food supply but that sold or made by the patentee. Take the invention of a patented window frame. It is now the law that the seller of the frame may stipulate that no other material shall be used in a house in which the window frames are placed except such as may be bought from the patentee and seller of the frame. Take an illustration which goes home to everyone,—a patented sewing machine. It is now established that, by putting on the machine, in addition to the notice of patent required by law, a notice called a license restriction, the right is acquired, as against the whole world, to control the purchase by users of the machine, of thread, needles, and oil lubricants or other materials convenient or necessary for the operation of the machine." It was this possibility that led to the later passage of remedial legislation in the Clayton Act.<sup>1</sup>

Third, the act should not apply to railways, because these are already amply regulated by the Commission under the Interstate Commerce law. In its power to fix reasonable rates and service, the Commission is well fortified with sufficient authority to prevent

<sup>1</sup> See the discussion of this law in the following chapter.

agreements of an extortionate nature between the carriers. This being so, why should we further burden the transport business with a clumsy prohibition against agreements in restraint of trade and interpret this prohibition to mean an agreement to fix freight rates? Such agreements would in no wise injure shippers' interests so long as the Commerce Commission enjoys its present powers. For example, the Northern Securities Company held the stocks of two competing railways, it is true, but this was no reason for its dissolution, since no destructive restraint of trade was proven against it and such restraint could at any time have been prevented under the rulings of the Commission. The Trans-Missouri Freight Association was held to violate the letter of the law, yet its purpose was a conservative and most beneficial one; to-day no business man or publicist advocates universal railway competition in freight rates. For the protection of both railway and shipper, the full control over their relations should be left to the Commission, unhampered by the Sherman Act.

Fourth, from the above, it is clear that the Sherman law should be applied to combines not because of their size, nor because of their purchase of competitors, nor because they are combines, but solely by reason of their effects upon business. If a combination is beneficial, it should be allowed to stand; if it is destructive or extortionate, it should be suppressed. To this end we need some device that will sift out those which, regardless of their size or form, are conducted upon fair, equitable, and efficient principles, from those which are practicing illicit, destructive and oppressive methods. The most practical means yet suggested for doing this is a Federal Trade Commission, with a jurisdiction over the commercial and trading companies corresponding roughly to that of the Interstate Commission over the railways. This proposal, at first greeted with strong opposition and even ridicule, made such rapid headway and gained so many recruits from both radical and conservative classes that it ultimately led to the fourth great step in our national trust policy, which is described in the sections dealing with the trade commission.

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#### QUESTIONS

1. What was the purpose of the Sherman law? What kinds of contracts and agreements does it forbid?
2. Explain its provisions as to monopolies.

3. Show the various criminal, civil and equitable suits which may be prosecuted when the Sherman law is violated.

4. What is the extent of damages which may be granted to injured parties, under the Act?

5. Does the Sherman Act apply to a combination of competing railways to fix freight rates?

6. Would it apply to such a combination if it could be proven that rate agreements between the railways were beneficial to the community?

7. Does the Act apply to combinations limited to the manufacturing business?

8. The Delaware, New Jersey and Pennsylvania farmers, engaged in peach culture, form a peach growers' association. They buy all the available trees in the three States. The government prosecutes them under the Sherman Act and proves their ownership of the peach trees. Is this sufficient?

9. The representatives of railways prosecuted under the Sherman Act for an alleged violation, make answer that it was not the purpose of Congress to repeal the interstate commerce law of 1887 by the Sherman Act of 1890, that the railway business is peculiar and different from other lines of industry, and that Congress intended to regulate trusts not railways by the act of 1890. Is this defence valid? Reasons in full.

10. If the government proved simply a monopoly of the ownership of mines in several States would this ownership be illegal under the Act?

11. A, B, and C manufacture umbrella parts. X and Y buy the parts from them and manufacture umbrellas. Because of competition between A, B and C the price fluctuates so that X and Y are never able to foretell what it will cost them to make an umbrella. X and Y for their own protection as customers, persuade A, B and C to fix a scale of prices by agreement. The attorney general prosecutes A, B and C for violation of the Sherman Act. They answer that the agreement was formed for the protection of their customers and at their customers' suggestion; it is therefore not in restraint of trade in the sense of the Sherman Act. Decision with reasons.

12. The village of "X" advertised for bids for road material. The cracked stone contractors of the entire State agree to allow one of their number to bid low, and the other to bid high. The favored one is to divide his profits with the others. Are they subject to prosecution under the Sherman Act? Reasons in full.

13. A suburban trolley line is formed to run from Philadelphia to Trenton. After the road is constructed a second line is built to compete with it but as there is not sufficient business to maintain both concerns, the older company purchases the second line. Has the Sherman Act been violated? Explain fully with precedent and reasons.

14. The managers of three large manufacturing and selling companies of national scope meet at lunch daily, and talk over prices. At the conclusion of the luncheon they settle upon a price below which they will not sell their product in competition with each other, but they do not make a written contract to that effect. Is this a violation of the Sherman Act? Reasons.

15. On the Board of Trade at D large quantities of grain from various States are sold. The members of the Board who are grain brokers, pass a resolution providing that the regular brokers' commission on each sale shall be 1/10% of the amount of the sale. Does the Act apply? Precedent.

16. Does the Sherman Act apply to a combination of manufacturers and wholesalers, agreeing to a list of higher prices to be charged all wholesalers outside the combination? Reasons.

17. Would it affect a company formed to buy and hold the securities of two competing interstate railway companies? Why? Precedent. Explain what is meant by potential restraint of trade.

18. To a company owning the stock of several competitive manufacturing and trading concerns located throughout the United States? Explain.

19. To a series of manufacturing and trading companies each of which own some of the others' stock, the majority of all the companies being determined by the same persons? Reasons.



20. Does it forbid you and your friends to form a syndicate which shall buy all the available wheat in the country through the Chicago Exchange and hold it until it has doubled in price? Reasons and precedent.

21. Does the Sherman Act prevent you from using your patent right to sell or refuse to sell to whom you please, the article which you have patented? Why?

22. The Doe Manufacturing Company has a typewriter patent. It sells each machine with a "license restriction" providing that the paper and ink used on the machine may only be those supplied by the Doe Company and providing further that all machines are sold subject to this agreement. Does the Sherman Act prohibit such a clause? Reasons. Cite an authority.

23. The Magical Medical Company sells a patent medicine to retailers with the written agreement that retailers will not sell the remedy to the public at less than \$1.00 per bottle. The purpose of the agreement is to prevent cut-price druggists from making temporary bargain sales of the remedy in such a way as to interfere with its permanent sale at standard prices by other druggists. Is the agreement binding under the Sherman Act? Reasons and precedent.

24. In the above case would the decision have been different if the remedy had been unpatented, but simply manufactured by a secret process?

25. Explain the difference between the rulings in the mimeograph and Sanatogen cases,—*Henry v. Dick* and *The Bauer Chemical Company v. O'Donnell*.

26. A department store cuts prices on music. Other music stores complain to the music publishers and the publishers' association agrees not to furnish music to any store which sells below a certain standard price. Can the department store recover damages under the Sherman Act? Reasons and precedent.

27. Why is such a strong effort being put forth by manufacturers to change the laws so as to permit price protection? What are your impressions of the arguments presented on both sides of the question?

28. Prepare an essay on Price Protection and The Sherman Act showing the methods, the advantages and disadvantages of price protection and outlining the proposals for a proper legal regulation of the problem.

29. Resolved that the Sherman Act has been partly successful. Defend either side of this question with a systematically arranged argument and cases illustrating the argument.

30. What do the cases thus far considered show to have been the least successful parts of the Sherman Act, or its interpretation by the courts? Examples.

31. What does the Sherman law provide as to the protection of a competitor whose business is damaged by an illegal combination?

32. What are your views as to the completeness of this protection in practice? Explain fully with illustrations.

33. Explain how the past interpretation of the Act has led to uncertainty.

34. Does the Sherman Act forbid combinations because of their size, or because of destructive restraints of trade? Cite the exact parts of the law proving your answer.

35. Prepare an essay on the Sherman Act showing the reasons for its passage, its most important features and their interpretation, and giving conclusions as to its value.

36. What is a boycott?

37. Did the Sherman Act originally apply to interstate boycotts carried on by labor unions? Cite examples.

38. Outline and explain the changes made on this point by the Clayton Act of 1914.

## CHAPTER VIII

### POWERS OF CONGRESS—Continued

#### PUBLICITY, THE TRADE COMMISSION AND THE CLAYTON ACT

**Third Period of Regulation.**—We have now considered two stages in our policy of trust control, viz: first, the attempt to prevent the building up of trusts by illicit rebates and special favors and discriminations on the railways; second, the effort to demolish the trusts by forbidding their formation in interstate trade. Both of these have been partly successful, as we have seen, in suppressing the cruder forms of discrimination and have partly failed in the original purpose, which was to preserve the opportunities for competition wherever possible, to protect the consumer from extortion, and to secure to the investor a moderate amount of safety. Meanwhile, public opinion passed through the third stage in which the new doctrine of Publicity occupied popular attention. In 1898 the extraordinary business boom following the Spanish War led to the flotation of a long list of new corporations, most of them grossly overcapitalized and many of them foredoomed to bankruptcy. The capital stock of these new combinations being sold broadcast to investors, enlisted all classes of the people in the ownership of the new enterprises,—when the inevitable harvest of bankruptcy followed, a profound and painful impression among all circles of the investing public was created.

A new thought then arose in the public mind—the prime evil of the trust or combination was not in its unfair discrimination against competitors but rather in the enormous overcapitalization of its own stock. This attracted public attention to the methods of corporate promotion, largely because the original promoters of the new combinations had been able to sell out their stock holdings, reap handsome profits, and “step from under” before the crash came. What could the government do to remedy these conditions? The answer was, “Publicity,” and as in the original campaign against the trust, the discriminatory freight rate had been attacked, while later the combination itself had been declared illegal, so now the remedy for corporate ills was believed to be a public statement of the facts, by government authority.

**The Bureau of Corporations.**—Accordingly, in 1903, the Department of Commerce and Labor was created, the chief feature of which was a Bureau of Corporations under the direction of a commissioner. The Commissioner of Corporations “shall have

power and authority to make, under the direction and control of the Secretary of Commerce and Labor, diligent investigation into the organization, conduct, and management of the business of any corporation, joint stock company or corporate combination engaged in commerce among the several States and with foreign nations, excepting common carriers subject to 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and to gather such information and data as will enable the President of the United States to make recommendations to Congress for legislation for the regulation of such commerce, and to report such data to the President, from time to time as he shall require; and the information so obtained or as much thereof as the President may direct, shall be made public."

The Commissioner was given power to summon witnesses, administer oaths, and hear evidence, and compel the production of documentary testimony. Under these provisions the bureau was organized and made several important investigations of interstate companies, the results of which were published as government documents. The commissioner appointed upon his staff, experts in research, and the results of the bureau's work have been the production of complete and authoritative data on the industrial, commercial and financial management of the industries investigated. Among the more important of these have been the transportation of petroleum and its products, the steel business, the tobacco business, sugar refining, inland waterways, water power companies, the lumber industry and the marketing of cotton. All of these have been carried on by the bureau through its special agents who have examined the financial methods, the transport and sale of products, the relations with the railways, the agreements between producers and many other questions affecting the commercial side of the industries named. The real service rendered by the bureau in making these investigations is the shedding of light upon business conditions, that is, the official collection and statement of facts which may be published by the direction of the President. Sometimes the mere knowledge that information on certain illegal practices has been secured by agents of the bureau was sufficient to cause their immediate cessation. In one case a series of important railway discriminations were stopped as soon as the bureau agents had collected the data necessary to prove them, even before the publication of the facts took place. 'This potential publicity of the practices arising in trade competition is one of the most effective methods of government regulation yet devised. The bureau, although it expended only a small annual appropriation, was successful in bringing about noteworthy and beneficent changes. It proved beyond question the wisdom of this third step in our regulative policy. With the added impetus which the publicity movement gained from the law of 1903 it soon became a fixed practice among industrial companies to issue annual or quarterly

statements of their business. In the short period from 1903 to 1910 a complete revolution in the publicity methods of all the great producing companies was brought about. The concern which practices secrecy of its accounts is now the exception rather than the rule. The personnel, powers and authority of the bureau of corporations have been taken over by the new trade commission under the Act of 1914.

**The Corporation Tax.**—Under the Act of 1903 many companies could not be included in reports of the bureau of corporations because they were not interstate concerns and were therefore beyond the jurisdiction of Congress. To remedy this President Taft incorporated in the Tariff Act of 1909 the provision for a corporation tax. This levy is imposed according to the net income of each company, as we have already seen in the chapter on taxation. Section 38 of the law provides that all corporations should make a report to the collector of internal revenue showing their gross and net earnings, and certain other items from which the collector is to make an assessment for taxation upon those which have a net income of \$5,000 or over. By this means it was planned to secure information as to the actual financial status of all the corporations of the country, regardless of whether they were engaged in interstate commerce or not. While it was the purpose of the law to make these reports public records, no appropriation to render them available for public inspection was ever made, and as a result they are only public to the extent that the President wishes to make them so. While neither the bureau of corporations nor the corporation tax has given to the investor any direct and important information on the conditions of a particular company whose stock he may consider purchasing, they have strengthened the general movement for publicity and have thereby indirectly wrought the desired result. The Corporation Tax has now been made a part of the general income tax under the Act of 1913.

**General Tendencies of Corporate Regulation.**—Of the three stages in our legislative program thus far considered, the regulation of rates has attracted most attention and yielded the greatest benefits thus far, but in the period from 1903-1910 the Publicity policy yielded the best results. Every great corporation in the land became desirous of securing public approval and co-operation. It wanted (a) To sell its stock to numbers of small investors in order that the public at large might have an active interest in the enterprise; (b) It must have a favorable public sentiment in order to market its wares most profitably; (c) The experience of recent years has taught that no corporation is strong enough to defy public sentiment. Such sentiment, when thoroughly aroused, brings on a destructive and hostile political movement which undermines the prosperity of all business undertakings; warfare *between the government and a corporation seldom results profitably for the latter.*

Many corporations are trying to win public confidence by vast and expensive forms of publicity and advertising, and various other means of influencing public opinion. They have engaged in a "campaign in the open." Secrecy of financial operations and juggling of accounts are slowly going out of fashion. The publication by the government of the results of its investigations of any business would naturally be sufficient to influence public opinion in such a potent way that no corporation would willingly oppose or disregard the sentiment thus aroused. The shrewder managers have already calculated that if publicity must come, they have much to gain by an early and cordial adoption of the policy; the business tide is setting strongly toward this new ideal. Mystery, secrecy, and suspicious appearances are being rooted out and the public is being courted with an eagerness that bespeaks a new understanding of the relation of the people to the corporation. In this new movement, which has already been of inestimable value to all concerned, the leading rôle and chief credit must be assigned to those principles of government publicity laid down in the Federal laws of 1903 and 1909.

#### THE FEDERAL TRADE COMMISSION

**Fourth Period: Administrative Versus Legislative Control of Trusts and Combinations.**—In our examination of the Sherman Act we saw that the advocates of the national commission plan viewed the whole question of trusts and combinations from a new and different angle. They pointed out that the national Congress is unable to regulate this problem in all of its rapidly changing aspects and details. The best that Congress can do is to fix a few general principles. The real regulation under these principles must be carried out by some authority which will devote its entire time to this one subject. The vast difference between the new plan and the old method of regulation may be summed up in the following ideas which lie at the basis of the commission system.

(a) Do not attempt to enforce competition where combination is feasible and beneficial.

(b) Let combinations grow as much as they please within reason, so long as they employ no extortionate or destructive practices.

(c) Hasten the settlement of disputes arising from the regulative laws, in order to secure for the business community an early settlement of the law on all important points, and thereby avoid uncertainty.

(d) To these ends let the control and regulation of interstate commercial companies, except the common carriers, be conducted by a national trade commission instead of by the national legislature and the courts as heretofore.

The practical force of these ideas is unanswerable. It has been *admitted on all sides* that our need has not been for extensive and

detailed *legislation*, but rather for some *administrative* machinery that would take the principles laid down by the lawmaker and apply them with impartiality, yet with elasticity, to the quickly changing conditions of industrial life. Congress, with its predominantly political aims and ambitions is not a suitable body for this purpose. We need rather some group of men, scientifically trained, with expert knowledge of their field, who can secure evidence, hear it, and form their conclusions accordingly, regardless of partisan bias or political effect. One of the great difficulties in our present interpretation of the law has been the uncertainty which many business managers feel as to whether their actions, contracts and agreements, and even the very existence of their corporations, are legal or not. The American Tobacco and Standard Oil cases were hastened to the utmost, yet it took five and a half years to reach an ultimate decision. There are other combinations in violation of the Sherman Act which have been in litigation in the courts exclusively on the point of their legality under the Sherman law for ten years. It has been calculated that over 1,200 combinations with ten billions of capital have to-day either an illegal existence, or one of doubtful legality. We may accordingly form some notion of the advantage to these concerns of having an authoritative, official statement of their legal status and some means of bringing their organization into definite compliance with the law upon a profitable basis. This suggests another advantage of the plan,—that it is preventive rather than remedial. The visiting of fines and imprisonments upon offenders has never been as successful in securing obedience to the law as has the plan of changing or removing the causes of offence. It is safe to say that the overwhelming preponderance of business men in all industries, would undoubtedly conform to the law as a matter of course, if its provisions were clearly drawn and reasonable, and were made to conform with the easily understood principles of commercial honesty. These advantages are undoubtedly possessed by the commission plan.

**The Need for Expert Service.**—Corporation attorneys have often pointed out that our courts, both Federal and State, experience serious difficulty in examining into all the intricate and multiform detail of business practices in a large corporation and in tracing the effects of these practices upon the business world. Such a task is entirely foreign to the natural jurisdiction of a court, and the judges, in order to perform it properly, would have to devote sufficient time and study to this one particular class of legal and economic subjects to become specialists therein. As they are not able to do this it may be said that the courts are unfitted for the work of supervising industrial combines. Yet the immense extent of government regulation of such corporations has created a new body of law, of legal and regulative principles, which does require the careful training and study of the specialist. What is still more important, the supervision must be a constant and continuing one

it cannot be the mere registering of a court decree which shall determine, once for all, the questions involved.

Let us examine the most favorable court procedure possible under the Sherman Act,—that illustrated by the dissolution of the Western Union-Bell Telephone combine. Here the Attorney General inspired by the desire to settle cases out of court, in order to avoid litigation whenever possible, was able to persuade the Bell system and the Western Union to separate voluntarily without legal prosecution. The Bell company agreed further not to purchase competitive telephone lines in the future, also to allow existing independent companies to connect with its lines upon payment of a moderate fee. But even when a court decree providing for these conditions is registered on the records of the Federal Courts, such a settlement covers only one aspect of the regulative problem. The Bell and Western Union companies and their independent competitors must still be subject to the supervision of the interstate commerce commission, both as to the reasonableness of their rates and the nature of the services to be offered. The meat packers combine to fix prices and practice other illegal acts forbidden by the Sherman law. They are enjoined by the Federal courts and prohibited from further continuance of these violations, as we have seen in considering *Swift v. U. S.*, 196 U. S. 307; 1905, yet five years later these same packers are prosecuted in a criminal suit in which the government alleges that they are still combining to manipulate meat prices. In their defence much weight is placed upon the *vagueness* and *uncertainty* of the anti-trust law, and they are acquitted, at the end of a long and expensive trial, after which the prices of meat products immediately rise. Why should the regulation of such an important industry be attempted by a few general terms in the Sherman Act? Can the immense interstate and foreign trade in meat products be adequately regulated in the public interest by means of a court decree or a criminal suit? It is not otherwise with other large interstate commercial enterprises. They might be willing to agree to a court order bringing them into general compliance with the main principles of the Sherman Act, but the ordinary routine of their business and their relations to their competitors should not be and cannot be successfully regulated by criminal prosecution or injunctions or any other court decrees. This routine and these business practices are matters of daily happening, changing frequently over night, and requiring for their proper regulation, the supervision of an administrative body with flexible inexpensive forms of procedure and possessing a staff of skilled experts or specialists who can ascertain and report on the business facts involved. A commission has such a staff of investigators, a court has not. A commission sits continuously and accumulates the precedents, maxims, and principles covering a given class of corporations more completely and in greater detail *than is possible in a court*. A commission in brief, would specialize

in the public regulative law of interstate commerce and would apply the principles of that law to the rapidly changing business conditions with a success that few judicial bodies could hope to attain.

**The Federal Trade Commission; Its Powers.**—The strong considerations already explained led to such a preponderance of opinion that President Wilson in 1914 endorsed the plan of a Trade Commission, which is the fourth step in our trust policy. The Democratic party for many decades had opposed material extensions of the Federal power and was at most only mildly favorable to the whole Federal system of regulation, but such was the change in all strata of public sentiment that the President's plan finally won and on September 26th, 1914, the new Federal Trade Commission law was approved. It provides a body of five members appointed by the President and Senate for seven years, each with a salary of \$10,000. The other central feature of the law is the provision in Section 5 "That unfair methods of competition in commerce<sup>1</sup> are hereby declared unlawful." The Commission is directed to prevent persons, partnerships, or corporations from using unfair methods of competition in commerce, excepting banks and common carriers. Somewhat like the Commerce body the Trade Commission is authorized to ascertain any unfair methods of competition, and to serve notice upon parties complained of that there is reason to believe that such unfair practices have been used. Thereupon the parties accused may appear and a formal hearing is held, at the end of which an order is issued by the Commission upon those concerned. This sweeping power is subject to review in the Federal Courts upon the appeal of any party to whom the order is directed. The Commission itself may also appeal to such courts to secure the enforcement of its orders. In order to expedite procedure the appeals in both cases are taken direct to a Circuit Court of Appeals, thereby skipping the lower or district courts and eliminating much delay. The Circuit Courts of Appeals are required to give precedence to such cases. A review of the court's decrees may be made by the Federal Supreme Court. Facts found by the Commission, if supported by testimony, are conclusive, that is, they are binding upon the court. If new evidence is produced at the court proceedings the court suspends action and refers the evidence to the Commission.

The Circuit Court of Appeals, after its hearing, issues a decree to enforce, set aside, or modify the orders of the Commission. Section 5 declares that no order of the Commission or judgment of the court enforcing the order, relieves or absolves any person or corporation from its liability under the Anti-Trust Act. That is, the rules and orders of the Commission do not supersede the Sherman Act. The new law does however provide that where the government is commencing a suit in equity against a corporation under

<sup>1</sup> *Commerce is defined in the sense of territorial, interstate and foreign trade.*



the Anti-Trust Act,—that is, where the Attorney General is seeking an injunction to dissolve an illegal combination under the Sherman law, the court before which the suit is held may ask the Trade Commission to work out a solution of the whole problem and may embody the Commission's recommendations in the court decree.

**Further Powers of the Trade Commission.**—The Commission also has power to gather, compile and publish information on the organization, business management, practices, etc., of any corporation engaged in national trade (excepting banks and common carriers), and its relation to other corporations or individuals.

It may require corporations so engaged to file annual and special reports or answers to questions under oath.

It may on its own initiative, or on the application of the Attorney General, investigate and report upon the manner in which a final court decree under the Anti-Trust Act, has been carried out and obeyed. In its decision it may publish this report.

When directed by the President or by either House of Congress, it investigates and reports on the facts relating to alleged violations of the Anti-Trust Acts.

Upon application of the Attorney General it may investigate and make recommendations for the re-adjustment of the business of any corporation alleged to be violating the Anti-Trust Acts in order that such corporation may thereafter manage its business in accordance with law. This significant power has been given to the Commission because of the large number of companies that were operating in violation of the Sherman Act who were anxious to bring their practices into conformity with the law. In many of these cases the Attorney General properly held that a reasonable adjustment or re-organization rather than a government prosecution would be the fairest and most equitable manner of enforcing the Act. The new provision just noted enables the Trade Commission to bend toward this object the expert service and experience which it may accumulate. In the records and personnel of the former Bureau of Corporations it possesses a valuable asset of this kind.

The Commission is authorized to classify corporations and make rules and regulations for the purpose of carrying out the new Act. It may also investigate trade conditions with foreign countries and ascertain the effect which foreign associations and combinations and trade practices have upon our foreign business, reporting to Congress its conclusions and recommendations. The law visits with heavy penalty any disclosure of information obtained by the Commission, except such which the Commission itself shall deem wise to publish. The purpose of this provision is to safeguard the business records and accounts of corporations from improper use by their competitors.

It will be noticed that the law gives to the new Commission some of the same general powers over commercial companies that the *Interstate Commerce Act* has given to the Commerce Commission

over railroads. The Trade Commission is not a merely investigating body with power to report, as was the Bureau of Corporations. The latter body is superseded by the Commission, and its powers and staff of employes have been taken over by the new authority. The Commission has full power not only to inquire and investigate but to issue orders which have all the force of law, and to provide rules and regulations both special and general, which shall carry out the great central principle on which the law is based, namely that unfair methods of commerce are prohibited. One of the serious difficulties which the new authority must face is the immense volume of work awaiting it. Undoubtedly a Commission of five members may find it difficult to hear, investigate and decide upon the great mass of problems affecting fairness of competition which are constantly arising. This, however, is not a defect in the principle upon which the law proceeds, but is rather a proof of the need for more extensive machinery to carry on the amount of work to be done. One feature of the law is especially notable and praiseworthy, viz., Congress has not attempted to regulate any detail of the minute questions of commercial competition but has contented itself with fixing one fundamental principle, and has authorized the Commission to translate this principle into rules, regulations, orders and decisions in the particular cases that may come before it. It is precisely this elasticity and adaptability that we have seen were most needed in our past regulations of the trust problem.

**The Clayton Act.**—The latest step in our regulative policy was taken in the passage of the Clayton Act, October 15th, 1914. This important measure has three objects.—First: To put the injured party or plaintiff who is seeking redress under the anti-trust laws in a stronger legal position, and make it easier for him to prosecute his suit. Second: To define more clearly certain abuses, discriminations, and restraints of trade, which had become common in trade relations, and to forbid these, or to empower the Trade Commission to suppress them. Third: The original bill covering these two purposes was supplemented by the efforts of organized labor so as to include a revision of the methods of granting injunctions in labor cases, and especially to legalize the boycott in labor disputes. These three separate objects were originally embodied in three distinct bills but in order to hasten congressional action the leaders in Congress decided to combine them in a single measure.

**First: The Legal Position of the Injured Competitor Under the Anti-trust Acts.**—Under the Sherman Act as interpreted by the courts a business concern which had been injured by an illegal combination must sue for damages in that Federal district in which the combination was incorporated, or "was found." This involved heavy expense of prosecution at a distance, the transportation of witnesses, the interruption of their business and private affairs, and accordingly a *material weakening* of the plaintiff's case. It explains *in part why so few private suitors were successful under the Sher-*

man law. They were unable, when their business existence was threatened, to secure funds for a lengthy litigation at a distance against a powerful competitor. For these reasons the Clayton Act, Section 4, provides that a plaintiff under the anti-trust acts, may sue in any District Court of the United States, of the district in which the defendant resides, or is found, or *has an agent*. Section 12 also provides that such suit or action against a corporation may be brought in any district *where it transacts* business. This clause is intended to remove the necessity of long distance litigation.

Another serious difficulty which the private suitor encountered under the older trust acts was that he must bear the entire burden and expense of litigation for several years before he could hope to secure a decision, even though the Government meanwhile, in another suit, had succeeded in proving that the combination in question was illegal. The great resources and machinery of the Federal Government have enabled it to win many decisions under the Sherman Act which could not have been secured by private parties, because of the expense and the large amount of work necessary to establish proof. Yet no private suitor could use the results of the Government's legal victories despite the fact that he was fighting for his business life against the same combine which the Government had already shown to be in violation of the law. He must accordingly take up his proceedings as a separate and independent matter entirely distinct from the results already secured by the Federal Department of Justice. Section 5 of the new Act remedies this by enabling a private party to make use of the government decisions in establishing his own case. It provides that where the Federal Government in its prosecution of violators of the anti-trust acts either by criminal suits or by injunction, has secured a court decision establishing a violation of the law, these proceedings shall be *prima facie* evidence of the violation of the Act, and may be used as such by a private suitor against the same violators. This clause materially lightens the burden of the injured suitor and enables him to make effective use of the Government's evidence and results.

Another notable change in the law is the privilege of securing an injunction against continuing violations of the anti-trust acts. This privilege is now conferred upon any persons and companies which are being seriously damaged by violations of the trust laws. Under the old laws a private suitor whose business was injured by such a combination could only ask for damages, but could not secure an injunction to forbid further illegal restraint of trade. Only the Federal Government itself could ask for this latter remedy. This was a serious omission, and was in fact such a weakness in the Sherman law that the small suitor as we have seen, was practically helpless even though he had what appeared to be a clear case against the large competitor. The Sherman Act provided that *the injured party might sue for damages*. It also provided that

"it shall be the duty of the several District Attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations." But the private suitor had no such right. Section 16 of the Clayton Act now supplements this omission as follows: "That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including Sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings; and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue." By extending to the concern which is chiefly interested, viz., the damaged competitor, the right to secure an injunction and thereby put an end to any continuing violation of the Act, the new law in reality saves the business existence of the injured competitor and places the vast machinery of the courts at his disposal to prevent further injury.

**Liability of Directors.**—One point on which much uncertainty existed under the Sherman Act was the individual liability of directors, officers and agents of corporations violating the anti-trust laws. In many criminal suits for such violations the men really responsible were able to escape on the ground that they were not active participants in the illegal combination, or that no evidence had been adduced in the suit to show that they had knowledge of what was being done by their companies. A strong sentiment against this legal situation led to the inclusion of Section 14 in the Clayton Act, which provides that whenever a corporation shall violate any of the penal clauses of the anti-trust laws such violation shall be deemed also to be the act of the individual directors, officers and agents who have authorized, ordered or done any of the illegal acts complained of, and that such directors and officers shall be liable to fine and imprisonment. This Section completely clears up the legal status of the director of any offending company and makes it to his direct and immediate interest to prevent violations of the law by his company.

**Second.—The Regulation of Trade Relations. Price Discriminations.**—While the language of the Sherman Act had been sweeping and general in that it prohibited every contract or agreement in restraint of national trade, such language was for this very reason weak and hard to enforce in the courts. Price discriminations and exclusive agreements existed in many lines of business on an *extended scale*, and many producers were crippled or destroyed in this way. For example—a wholesale dealer in product "a," a staple

article of wide general consumption, wishes to sell the goods made by the combine or trust and those made by its competitors. The trust, however, informs him with regret that unless he agrees to handle only its own products he either cannot secure its products at all or must buy them at a much higher price than if he agreed to abandon the independent competitor's goods. Faced by this alternative most wholesalers at first objected strenuously, and then were slowly beaten into line. If they sought to handle both trust and independent goods, the higher discriminatory price which they must pay on trust products *because* they handled both, soon deprived them of all profit and many wholesalers speedily found themselves pushed to the wall by some other favored dealer supported by the trust. The same practice was becoming successful in certain retail lines, and it seemed only a question of time until by these exclusive sales agreements and price discriminations the large combine in certain fields would be able to extinguish competition. The Clayton Act in Sections 2 and 3 forbids all such price discriminations between consumers, "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Section 3 also forbids the lease or sale of goods, machinery or other commodities patented or unpatented, or the fixing of prices therefor, on the condition or understanding that the purchaser or lessee shall not use the goods, machinery, etc., of competitors, where the effect of such an agreement or lease may be to lessen competition or create a monopoly. This clause fortunately revokes the decision of the Supreme Court in *Henry v. Dick*, 224 U. S. 1; 1912, which we have already considered.

**Holding Companies and Interlocking Directorates.**—Another problem which engaged public attention extensively before the passage of the Clayton law was the close, intimate relation existing between many companies that were supposedly competitive, the prevalence of the holding company and of interlocking directorates, and the many devices which had been used to bind together the industrial combines, the railways and the banks. The Congressional leaders in 1914 sought to dissolve these relationships, or at least to loosen them, by Sections 7 and 8 of the Clayton Act. These provide that corporations engaged in commerce shall not acquire directly or indirectly the stock of other corporations so engaged, where the effect of such acquisition would be to lessen competition between the companies. This in substance only makes more definite and detailed the principle already enacted in the Sherman law. The Supreme Court has repeatedly declared in the Northern Securities case and other decisions that such a merger or common stockholding was illegal. Section 7 of the new Act does, however, make more explicit and clearer the prohibition against this common form of restraint of trade. An exception is allowed in cases where *such purchase of a corporation's stock is solely for investment*

purposes, or where a large concern wishes to form subsidiary companies and to control their stock for greater convenience of operation, or where a railway wishes to start branch lines to act as feeders to its main system. In all such instances a company may own the stock of the other concerns.

Closely similar to the holding company is the interlocking directorate between several corporations, whether competitive or otherwise. It has become customary for the same persons to act as directors in several banks, trust companies and other financial institutions. The large corporations have as their directors many men who are also directors in railways, and the railways have among their directors men who are officers in supply companies which sell materials to the carriers; it has been no less common for competitive manufacturing and trading companies to have interlocking directorates. This custom was not due solely to the natural desire of men of wealth to invest in many and varied enterprises and to hold places of authority in such companies. It was rather in many instances the result of a plan to control competitive concerns and to stabilize conditions, to solidify the direction and management of related companies, and especially to secure and retain the patronage of the principal customers of the large industrial combinations. The Clayton Act seeks to dissolve this system. Section 8 provides that after October 15, 1916, no person shall be a director or officer of more than one national bank either of which has deposits, capital, surplus and profits of more than \$5,000,000, nor shall the officers or directors of a State bank of such size be eligible to the directorship in a national bank in cities of more than 200,000 inhabitants. The officers or directors of a national bank shall not be officers or directors of any other bank except savings banks. It also provides that no person shall be a director in two or more competitive interstate commerce corporations aside from banks and railways, if either of them has capital, surplus and undivided profits of over one million. Section 10 provides that no common carrier in interstate trade shall buy or sell securities, supplies or other articles of commerce, or place contracts for construction or maintenance to an amount of more than \$50,000 in any year with a corporation if any of the directors or executive officers, or purchasing or selling agents be at the same time a director, manager, or purchasing or selling agent in or have a substantial interest in such other corporation. Such purchases may, however, be made from such a company by open, competitive bidding, providing the company offers the bid most favorable to the carrier.

**Provisions on Labor Combinations.**—The third purpose of the Clayton Act, to amend the labor law dealing with injunctions and boycotts, was carried out in answer to the insistent demands of the labor unions. The wording of this third set of provisions is not as *clear and definite as could be desired*. It seems to legalize the *boycott in interstate trade*, and to forbid the issuance of injunctions

in labor disputes, when such injunctions are aimed to forbid picketing, the strike or the boycott. From the unfortunate phrasing of these sections the meaning is so doubtful and unclear as to require extended interpretation by the courts,—a most undesirable feature of the Act. Former President Taft has pointed out that if the courts construe these sections according to well-accepted principles of judicial interpretation, the application of the law would be limited to a very small class of disputes, and the expectations and hopes of the labor unions would be accordingly disappointed. Such an outcome could only tend to increase the prevalent criticism of the judiciary, when in fact the real difficulty lies in the unwillingness of Congress to face the issue squarely, and to insert in the law provisions whose meaning and intention would be clearly apparent to all. The provisions of the Act which deal with these questions are considered in the Chapter on The Judiciary, and in the sections dealing with the labor boycott.

**Proposals for Revision of the Trade Commission's Powers.**—To many the present powers of the Commission seem too exclusively negative and prohibitive in nature—it may forbid and investigate and prohibit, but it may not permit. Section 11 of the Commission Act provides that “nothing contained in this act shall be construed to prevent or interfere with the enforcement of the provisions of the anti-trust acts or the acts to regulate commerce, nor shall anything contained in the act be construed to alter, modify, or repeal the said anti-trust acts or the acts to regulate commerce or any part or parts thereof.” This makes it clear that the Commission cannot legalize any agreement. Section 7, of the Clayton law, dealing with holding corporations and the union of competitive companies, declares that “nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the anti-trust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.” And Section 11 of the same Act after outlining the powers of the Commission to prevent unfair competition, again limits the Commission's authority by declaring that “no order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the anti-trust acts.” We have therefore in these two statutes several clearly worded clauses which emphatically reassert all the provisions of the Sherman Act and prevent the new Trade Commission from using its powers in such a way as to apply the Act in a modern sense. Yet we have seen that the great advantage to be gained by such a Commission is precisely this sound modern view of the law which would distinguish between various types of combinations in restraint of trade, allowing those which are beneficial to stand and suppressing those which are harmful. It is believed that a Commission with power to do this would succeed in solving the problem *more readily than a legislative control with its inflexible prohibi-*

tions and penalties. Recent decisions of the Supreme Court have shown a desire to interpret the Sherman Act as a protective rather than a destructive measure. In the Acts of 1914 Congress has done well in placing the Commission as an advisory body at the disposal of the Federal Courts and the Attorney General, to work out dissolution plans whereby illegal restraints of trade and agreements may be dissolved, or brought into harmony with the law. It would be even better to turn over entirely to the Commission the authority, subject to judicial review, to prevent combinations which were destructive, and to permit those which would be advantageous to the community. The Commission by the fact that it conducts a constant supervision over interstate companies is especially well qualified to distinguish between the sinister and the beneficial, and to administer the law with flexibility and with greater control of the changing details. It is strongly urged that the Commission should have authority to approve price-fixing agreements and other arrangements in interstate trade which are now forbidden by the Sherman Act, if after investigation the Commission believes these agreements to be beneficial in their effects. It has been suggested that a combination might be made between the Federal license plan described in the next section and the Trade Commission, whereby the latter body would grant licenses or permits to those engaged in interstate commerce. According to this view, the Commission, under authority from Congress, would also fix the general conditions upon which such licenses would be granted and would watch over the enforcement of these conditions. It would exclude from interstate commerce those who did not conform to the law and did not secure such licenses.

This view of the proposed duties of the Commission, it should be noticed, offers a much broader scope of liberty to interstate companies, and provides a much clearer definition of what they can, as well as what they cannot do under the law. It would therefore remove most of the uncertainty now hanging over business enterprises under the Sherman Act. Against this proposal certain forceful objections have been urged. (1) The question of constitutionality. (2) The possible influence of such a plan in maintaining high prices.

(1) Its unconstitutionality; it is urged that under the 5th Amendment which declares that "no person shall be deprived of life, liberty or property without due process of law," a Commission would be forbidden to reduce rates, prices, or terms of sale or production in such a way as to deprive investors and producers of a proper return on their capital. Numerous decisions of the courts have fixed the principle that under this amendment no firm or company can be compelled to produce at a loss nor have its right to produce at a profit taken from it. This objection would be readily avoided so long as the Commission allowed the companies subject to its regulation to fix prices at a level that would enable them to



make a reasonable profit. In doing so it would not be depriving them of their property without due process of law.

On the point of constitutionality it has also been urged that the only industries heretofore subject to regulation of rates and prices by the Government have been common carriers and public utility corporations such as telephone, telegraph, theater, water supply, lighting and similar companies, while private industries have not been so regulated. So long, however, as the regulation took the form of an approval or disapproval of price-fixing *agreements* in interstate trade, it would not be a simple regulation of prices but rather of agreements and combinations and for this reason would be justified as a protection of interstate commerce.

(2) Would the Trade Commission by keeping up prices, guarantee the continued existence of inefficient high cost producers and trading companies? If the Commission is to proceed upon the principle that every existing producer must be allowed to charge rates that will give him a continued profit the commission plan would be nothing less than the government protection of the inefficient and unworthy at the cost of the country as a whole. Under it we should have a guarantee of continued high prices with a moderate profit assured to the worse producers and a high profit to the better managed companies. Such a plan would neither work to the advantage or improvement of our industries and industrial methods nor to the benefit of the consumer. If, however, we examine the efforts made in similar fields by other bodies such as the late tariff board and the Commerce Commission, we find that the opposite is true in those departments. It was not the purpose of the tariff board in its researches into the cost of production at home and abroad to prepare a system of tariff rates that would protect every American manufacturer regardless of whether his methods were modern or antiquated, economical or inefficient, or his wage rates high or low, nor could such a rate of tariff reasonably be demanded by any large body of producers. On the contrary the protective principle requires that those producers who are efficient and employ up-to-date methods shall be protected, since they constitute the progressive element in the industry while those who refuse to develop their industries along modern lines should not be maintained at the cost of the whole community. The tariff proposed was not a protection to the inefficient but to the well-organized modern enterprise. The same is true of the railways. When a schedule of rates is proposed for the approval of the Commission that body does not and cannot base its decision upon the dividend demands of the most poorly managed roads with inadequate rolling stock, terminal facilities and the like. On the contrary, the Commission conceives its duty to be to fix a rate which will allow a profit to the fairly well-managed line leaving variations from the *rate of profit* to act as an incentive to better management.

*If the new Trade Commission were given power to approve of*

beneficial, advantageous agreements even when in restraint of trade, public opinion would compel that body to withhold its approval of any price-fixing agreements or combinations which destroyed healthful competition or which fixed a high price regardless of the proper use of modern efficient methods of production. On the other hand, such a commission could not lower rates beyond the point of safety for the efficient producer since the effect of such a change would immediately be shown by the evidence adduced before the Commission. If these two statements are correct, one of the chief objections to the commission plan is overcome. There remains, however, a very forcible criticism by Mr. James J. Hill to the effect that a commission plan would lead to the destruction of competition and that such a change would remove all incentives to the adoption of new methods and the improvement of industrial processes. This objection has not been under discussion for any length of time, but it does not seem to be unanswerable. The action of a Trade Commission in approving price-fixing combinations tends to limit prices as we have already seen, and this pressure would in itself be sufficient to induce new economies and modern methods.

**Proposals for Federal License and Federal Incorporation.**—In addition to the prohibition of rebates, the Sherman Act, the publicity laws and the national Trade Commission, it has also been proposed that a plan either of Federal *license* or of Federal *chartering* of interstate trading companies be established. The idea is that certain standards both of publicity, stock issues, price-fixing agreements and other matters connected with trade companies shall be fixed, to which all interstate companies shall conform in order to receive the permit or the charter to engage in national business. These suggestions have been before the public since 1904, when they were presented in a valuable report by the bureau of corporations of the department of commerce. We shall consider only the main outlines of each plan.

**Federal Incorporation.**—The chief features of this proposal are: (a) The grant of a permanent national charter by the Federal Government to companies desiring to engage in interstate commerce. Congress has the right to grant such a charter under its power to regulate commerce. This principle was established in *McCulloch v. Maryland*, 4 Wheaton, 316; 1819, in connection with the establishment of the United States Bank. It was approved under the congressional powers to levy and collect taxes, to borrow money and make use of the same for the payment of the debts of the United States. If, under each of its various powers, the National Government may in this way incorporate companies connected with the power in question, then it has an undoubted right to charter corporations which shall engage in interstate commerce.<sup>1</sup> In granting

<sup>1</sup> *It has already exercised this authority for many years, by chartering railways and other interstate enterprises.*

these charters the advocates of the plan propose that the Federal Government shall attach a number of conditions which will enable it to control the companies in question at all times. (b) Exclusion from interstate commerce of all companies not holding a Federal charter. There can be no doubt that Congress has ample authority to adopt this part of the plan also. If any company refused to incorporate under the system provided by the National Government it would be deprived of its interstate trade privileges and would be forced to confine itself to the limits of a single State. No large commercial companies could forego the advantages of interstate business. They would undoubtedly conform to the requirements of such a law and take out charters. (c) Could Congress grant to the companies which it chartered the authority to engage in manufacturing and production in the States? It is clear that such authority would be of the greatest value to the large companies; unless they possessed it they would have to secure from the States a charter of incorporation to manufacture and thereby duplicate charters, officers, stockholders, and other corporate requirements. While duplication would be possible, it would not be desirable. On the other hand, it seems most unlikely that the courts would allow Congress to charter companies for the purpose of engaging in manufacturing, since Congress has no constitutional authority over manufactures. The incorporation plan, therefore, has the marked disadvantage of requiring duplicate corporations.

**Federal License.**—This consideration has turned attention toward the plan of Federal license. It contemplates (a) a simple temporary permit by the National Government issued to companies desiring to engage in interstate commerce; (b) the requirement that certain conditions of organization, methods of management, etc., etc., as above described, should be fulfilled before a license or permit was issued; (c) full and detailed reports and returns to be made at regular periods by the corporation to the Federal authority in charge; (d) publicity of such records as the Federal Government, in answer to public opinion, should consider necessary, having in mind both the public interest and the safety of the corporation itself; (e) the regulation of the issue of securities by such companies. This regulation would take the same form approximately as that now provided by our State public service commissions. Such security regulation is much criticized in various quarters but its purpose, methods, and practical results in the States present strong advantages both from the standpoint of the public and the investor; (f) all unlicensed companies would be excluded from interstate commerce. A license would therefore be compulsory; (g) the strict enforcement of the law would be obtained by the temporary suspension or the final revocation of the permit or license in case the company refused to comply with the legal requirements; (h) such a law could be readily administered by the newly organized Federal Trade Commission. It would hold hearings, take

testimony either on complaints or on its own motion, would consider applications for permits and it would be assisted in this work by the extensive and highly organized staff of the corporation bureau. In the operation of this plan no serious administrative difficulty would be encountered which has not already been met and overcome in other departments of the Government. A comparison of the two plans shows that the incorporation proposal enjoys the great advantage of uniformity. The license or permit plan, however, is undoubtedly constitutional, requires no duplicate organization of the companies involved and but slight expense on their part. It is founded upon existing precedents which have been worked out by the commerce commission in part. Finally it fits in with existing business conditions and involves less disturbance than any other proposal. For these reasons it seems to offer the greater prospects of success until such time as public opinion is ready to transfer the regulation of manufacture to the National Government.

**Federal and State Powers of Incorporation.**—Each State may incorporate companies for any purpose that it chooses. It may give these companies in their charters the right to exist and transact business anywhere in the world, provided that other State governments or Congress, or foreign governments will permit such corporations to come into their respective jurisdictions. No corporation without this right can enter another State to open up its business offices or transact its affairs, neither may it engage in interstate trade, unless Congress either expressly or tacitly permits. The lax corporation laws of the States have so greatly lowered the requirements for chartering a company, and the variety of rules passed by the different States to govern corporations coming into their boundaries from other States have, taken together, formed a chaos of corporation law and regulation which can be straightened out in only one way—by turning over to the Federal Government the entire control over incorporation and the rights which flow from it. At present Congress can only charter a company to engage in those forms of business which are subject to Federal regulation, because the constitutional powers of Congress do not extend beyond such subjects. For these reasons we need an amendment extending the Federal authority over all matters connected with the formation and powers of any companies which transact business in the United States. The reasons for State control of incorporation were originally strong and binding. The policy of each State it was felt should be free on this question. It should have the exclusive control over any company, whether chartered by itself or by other commonwealths which might wish to enter its boundaries to transact business there, and this reasoning is unanswerable so long as the States vie with each other to grant the most favorable terms of incorporation to new companies. If they are allowed to do this *then it is essential that each commonwealth must have a corresponding authority to protect itself by supervising, regulating and even*

excluding such corporations from its bounds. But on the other side, the corporation itself needs more protection. And more especially for those which are chartered by States with reasonable or high standards of incorporation there should be some central authority, such as the Federal Government, to insure the free entrance to all the States of the Union for any company which had complied with all the necessary requirements of safety, honesty, publicity, etc. The new problem in national incorporation is to transfer to the central government this power. Business has become national. Corporations are no longer matters of State concern. These are very apparent commercial facts, and our law should correspond with them. Such are the considerations which have created and are rapidly strengthening the demand for Federal control of incorporation.

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### QUESTIONS

1. What do you consider the chief differences in purpose and aim between the Federal Railway Law, the Sherman Act, and the Publicity Laws?
2. Explain the rise of the demand for government publicity in corporate affairs.
3. Outline the powers of the Bureau of Corporations.
4. What kinds of corporations could the Bureau regulate?
5. The Commissioner of Corporations calls for reports by Insurance Companies on their business, with a view to possible publication. A company refuses to report. Can it be compelled to do so? Reasons.
6. Outline the more important work performed by the Bureau of Corporations.
7. Explain the chief features of the Corporation Tax of 1909.
8. Why was it passed?
9. Why are large companies more desirous now of securing public approval and co-operation than they formerly were?
10. Prepare an essay on the Federal Publicity Laws showing their distinct purposes and results.
11. Resolved that administrative rather than legislative control of business combinations is advisable. Defend either side of this question.
12. You are present at a discussion of judicial control of the trusts and the difficulties which this control has encountered in recent years. Outline your views.
13. Resolved that the government attempts to control and regulate the Beef Trust should be conducted on new and different lines. Outline your views.

14. Explain to a group of men who have not studied the subject the new Federal Trade Commission and its powers.

15. What is the procedure before the Commission.

16. When appeals are made from the Commission's rulings to what court are they taken, and why?

17. Upon an appeal to the courts from the Commission's decision the defendant introduces new evidence. What will the court do, and why?

18. In a discussion of the Commission's powers it is said that the Commission may excuse or approve acts and agreements in interstate trade which were formerly forbidden by the Sherman Act. Explain with citations whether this view is correct or not.

19. How can the Commission get the information on which to base its decisions and rulings?

20. What are your views as to the usefulness of the Commission in future law-suits under the Anti-Trust Acts?

21. Can the Commission secure information only when a case is before it? Explain fully.

22. What does the Commission Act of 1914 provide as to the Bureau of Corporations?

23. You are asked to draw up a brief report showing the difference between the powers of the Bureau of Corporations and the present Trade Commission. Outline your report.

24. Why was the Clayton Act passed?

25. Give your views of the correctness of each of the following statements, verifying them with citations from the Sherman law:

(a) The Sherman Act enables the injured competitor to make use of the results of government suits against a combination which is violating the law.

(b) The Sherman Act enables anyone whose business is injured by an illegal combination to secure a court injunction immediately stopping the continuance of the injury.

(c) The Sherman Act enables the injured company or firm to sue an illegal combination in any Federal Court in any section of the country where the plaintiff has suffered an injury.

26. How does the Clayton Act seek to remedy these conditions?

27. A combination is accused of certain illegal acts in attempting to destroy its competitors. The directors of the combination when accused in the criminal courts defend themselves by saying that they did not personally commit the acts complained of. Show the difference between the provisions of the Sherman and Clayton Acts respectively on this point.

28. What do you understand by price discriminations and exclusive agreements?

29. Was an exclusive agreement valid under the Sherman Act in the interstate sale of patented articles?

30. What is the chief change wrought by the Clayton law on this point?

31. What is a holding company?

32. Was it permitted under the Sherman Act when it involved restraint of competition or trade between the States?

33. Is it legalized by the Clayton Act?

34. What are interlocking directorates?

35. Explain and illustrate the application of the Clayton Act to such directorates.

36. Outline briefly the difference between the Sherman Act as interpreted in the courts, and the Clayton Act, with reference to labor boycotts in interstate trade.

37. Resolved that the Trade Commission should have power to permit agreements in restraint of trade when such agreements in its judgment are beneficial. Defend either side of this question.

38. Resolved that similar power should also be conferred on the Commission

to approve price-fixing agreements. Defend either side of this question and show the constitutional aspects of the problem.

39. What do you understand by Federal license and Federal incorporation respectively of interstate companies?

40. Why have the proposals been made?

41. You are asked to report on the details of a bill for Federal incorporation. Outline your report.

42. A report on Federal license.

43. Explain the difference between the constitutionality of the two plans, and give your views as to their relative feasibility.

44. What constitutional power would the Federal Government have to charter or incorporate companies engaging in interstate trade? Cite an authority.

45. Why have the States passed lax corporation laws?

46. Can a corporation chartered in one State operate in a second without the permission of the latter?

47. Prepare a brief essay on the advantages and disadvantages of a constitutional amendment authorizing Congress to regulate the granting and revocation of all corporate charters, whether financial, commercial, manufacturing, agricultural, or otherwise.

## CHAPTER IX

### POWERS OF CONGRESS—Continued FEDERAL POLICE POWER OVER INTERSTATE COMMERCE

CONGRESS has not confined its regulations to the carriers and the large combines,—it has made free use of its commercial power in numerous other directions which have been approved by the courts, and there is now no doubt that Congress possesses a full police power to control national trade in any and every necessary way. As examples of this we shall consider:

The Control over Immigration.

The White Slave Act.

The Pure Food and Drug Laws.

The Lottery Acts.

**The Immigration Law.**—The Immigration Act as amended March 25, 1910, provides a tax of \$4.00 for each alien entering the United States. The following classes are excluded from entrance:—

Idiots.

Insane.

Epileptics.

Paupers and persons likely to become a public charge.

Professional beggars.

Persons suffering from tuberculosis or other dangerous or loathsome contagious diseases.

Persons physically or mentally so defective as to be unable to make a living.

Persons convicted of a crime or misdemeanor involving moral turpitude.

Polygamists.

Anarchists.

Women or girls imported for immoral purposes and persons aiding in their importation.

Contract laborers—that is, those induced to migrate by offers or promise of employment or by agreements, except artists and professional men.

Children under 16 years of age unaccompanied by their parents.

Chinese and persons of Chinese descent, except students, merchants and professional men, or employés who accompany exhibits to any exposition given within the United States.

*Transportation companies and vessel owners are forbidden from*



soliciting or inviting emigration to the United States, although they may issue advertising matter on the sailings of their vessels, etc. A physical and mental examination of foreigners arriving at our ports is made by medical officers of the national health service. The costs of this inspection are paid by the head tax on each immigrant and a considerable surplus still remains in the "Immigrant Fund." All aliens brought into the country in violation of law, are, if possible, immediately sent back to the country whence they came, on the vessel bringing them, at the expense of the vessel owners. There is also a heavy fine upon the transportation company or vessel owner for unlawfully introducing immigrants into the United States. Aliens who become a public charge from causes existing prior to their landing in America are also deported to their home country. This may be done up to three years from the time of their entrance. The execution of the law is entrusted to the Commissioner General of Immigration; he appoints, subject to the approval of the Secretary of Commerce, a number of commissioners at the various seaports of the United States, together with inspectors, investigators and other employés. Disputes as to the admission of aliens are referred to boards of special inquiry appointed by the Commissioner at each port; these boards decide as to the alien's qualifications for entrance and an appeal may be taken from their decision to the local commissioner, from him to the Commissioner General and ultimately to the Secretary of Commerce. The Commissioner General also establishes a division of information for the benefit of immigrants. This division aims to promote the proper distribution of immigrants into those sections of the country where immigration is most needed. Correspondence with State and territorial officers is conducted and complete information regarding the resources and opportunities in each State is presented in foreign languages and distributed among the incoming aliens.

**Protection of Immigrant Women.**—The immigration authorities and the Department of Justice having ascertained that organized and systematic efforts were carried on to induce or force respectable women and girls, arriving in the country, to lead an immoral life, and that such women because of their ignorance of the country and the language were in special need of protection, it was decided to take unusual precautions for the safety of arriving immigrants. Not only was the importation of women for an immoral purpose forbidden but Section 3 of the Act of 1907 provided that whoever should maintain, control, support, or harbor for an immoral purpose, any alien woman or girl, within three years after she shall have entered the United States should be guilty of a felony. This section led to an important decision on the legal powers of Congress over immigration. A Hungarian woman, having entered the country in November, 1905, came to Chicago in October of 1907 to a house of vice which was purchased in November of the same year by *Keller and Ullman*. The girl had been engaged in the illicit calling

about eleven months at the time that Keller and Ullman were arrested and prosecuted under the clause above mentioned, of the Immigration Act of 1907. This case presented the important constitutional question whether Congress could exercise a protecting care over immigrants during a period of three years after they had entered the country or whether an immigrant ceased to be an immigrant before that time and therefore ceased to be under the national control and regulation and became subject only to State protection. The Supreme Court decided, in *Keller and Ullman v. U. S.*, 213 U. S. 138; 1909, against the National Government and declared Section 3 of the act unconstitutional. The Court held that the Constitution conferred on the United States no power to regulate the ordinary affairs and relations of aliens *after they had taken up residence*. It pointed out that the census of 1900 gave the total population of the country at 76,000,000 of which about 10,000,000 were persons of foreign birth. Could Congress extend its control over all these persons under the guise of protecting immigrants? If so, declared the Court, Congress might regulate all their other relations regardless of the States. Such was clearly not the intention of the Constitution. Congress can control immigration but not the conditions of the immigrant for three years after he has entered the United States. A strong dissenting opinion was rendered by Justices Holmes, Harlan and Moody, who pointed out that if Congress did not have the power to control immigration by punishing those who corrupted or preyed upon immigrants in an unlawful way, then some of the very substance and value of its protective authority over commerce was lost. This important limitation of the national power over, and protection of the immigrant after he or she has taken up a residence within the country should be remedied and Congress should possess ample authority to deal with the problem as a national question. This is all the more essential in that our treaties with foreign nations obligate us, *as a nation* to protect the lives, the safety, and the welfare of their citizens within our borders, and we as a nation should exert the powers necessary to carry out the promises and obligations which as a nation we have contracted. In order to remedy this, the Mann White Slave Traffic Act of 1910 contains a special provision requiring the registration of certain information about every alien woman or girl engaged in vice within three years after she enters the United States. The Act requires this information to be received and centralized in the office of the Commissioner General of Immigration. In the Keller case the Supreme Court, in declaring unconstitutional the attempt to punish persons for harboring alien women and girls engaged in this illicit calling, had made the suggestion that possibly a modified protection of immigrants might be constitutional *if made in pursuance of a treaty* between the United States and some foreign power. The Mann Act builds upon this suggestion by requiring *the registration of women and girls as above described, in pursuance*

of an agreement made between the United States and foreign powers at the Paris conference of 1902, the substance of which was that the respective governments represented in the conference should supervise and protect immigrant women and girls during a three-year period. Here again, however, the same constitutional difficulty may arise unless the Supreme Court is willing to concede to the Federal Government what it undoubtedly should have, the full and undisputed right to protect alien women for an indefinite period, in fact, so long as protection is needed against those dangers which arise from the fact that they are immigrants.

**The White Slave Act.**—On June 25, 1910, the so-called Mann White Slave law was signed by the President. This oft-cited measure makes it a felony punishable by a heavy fine and imprisonment for any person to cause to be transported or to aid in transporting any woman or girl in interstate or foreign commerce, for immoral purposes, or to induce or compel a woman or girl to go from one place to another in interstate or foreign commerce or in any territory, for such a purpose. The law was passed after a thorough investigation, made by agents of the Department of Justice, had made it clear that immense numbers of women and girls were not entering immoral life voluntarily, as was commonly supposed, but were being lured or forced by violence and crime into the abyss, and that many persons were systematically engaged in the revolting vocation of securing and selling new victims. This traffic so far as it takes place entirely within the borders of a State cannot be reached by the National Government for constitutional reasons, but when it crosses State lines it becomes subject to Federal regulation. The Mann Act operates on the same principle as the food laws, the lottery act, and the trust regulations—it prohibits any attempts to circulate the forbidden object in interstate commerce. It has been repeatedly tested in the courts and although opposed by all the ingenuity and legal skill which could be mustered by the accused, it has been upheld by the Supreme Court and is now a strong and effective weapon in the fight against organized vice. There is needed however a much larger appropriation for the detection and prosecution of offenders and the co-operation of State authorities, in order to stamp out this blot upon our civilization.<sup>1</sup> The attempts to overturn the law have raised some impor-

<sup>1</sup> The chief provisions of the Act of 1910 are:

Sec. 2. "That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any

tant questions concerning the extent of the national authority over interstate trade. The most serious objections were raised by the defendants in *Hoke and Economides v. U. S.*, 227 U. S. 316; 1913. Here it was urged, first: that any person had a right to pass from State to State, and that a woman, no matter what her moral character might be, possessed this right. Accordingly, when Congress attempted to prohibit anyone from inducing a woman to go from State to State it was in effect saying that persons might not be persuaded to do what they had a legal right to do. This was impossible as a legal doctrine, said the defence, for Congress had no such authority. To this the Supreme Court answered that no one had an absolute right to pass in interstate trade,—if he or she intended to make use of this right for a purpose which Congress deemed immoral, harmful, or injurious to the community,

place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

Sec. 3. "That any person who shall knowingly persuade, induce, entice or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl to go from one place to another in interstate or foreign commerce, or in any Territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any Territory or the District of Columbia, shall be deemed guilty of felony and on conviction thereof shall be punished by a fine of not more than five thousand dollars, or by imprisonment for a term not exceeding five years, or by both such fine and imprisonment, in the discretion of the court.

Sec. 4. "That any person who shall knowingly persuade, induce, entice, or coerce any woman or girl under the age of eighteen years from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, with the purpose and intent to induce or coerce her, or that she shall be induced or coerced to engage in prostitution or debauchery, or any other immoral practice, and shall in furtherance of such purpose knowingly induce or cause her to go and to be carried or transported as a passenger in interstate commerce upon the line or route of any common carrier or carriers, shall be deemed guilty of a felony, and on conviction thereof shall be punished by a fine of not more than ten thousand dollars, or by imprisonment for a term not exceeding ten years, or by both such fine and imprisonment, in the discretion of the court.

Sec. 5. "That any violation of any of the above sections two, three, and four, shall be prosecuted in any court having jurisdiction of crimes within the district in which said violation was committed, or from, through, or into which any such woman or girl may have been carried or transported as a passenger in interstate or foreign commerce, or in any Territory or the District of Columbia, contrary to the provisions of any of said sections."

then Congress could not only withdraw the privilege of interstate trade for such purpose, if it chose, but could also prohibit other persons from inducing a woman to make use of her supposed right for such immoral or injurious purpose. In the second place, the defendant urged that Congress had no authority whatever over morals,—this was reserved to the State governments; when Congress attempted to reach over into the bounds of a State and forbid an act which it considered immoral, it was usurping State authority in an unconstitutional manner. Hence, the Act of 1910 exceeded the Federal powers. To this the Court replied that not the practice of commercialized vice itself was forbidden by the Mann Act,—such practice was undoubtedly subject only to State regulation; but the purpose and terms of the law expressly aimed to prevent the *passage from State to State* of women under the control of commercialized vice. This passage no State had the constitutional authority to regulate, it was solely subject to the power of Congress. Accordingly the Act was a constitutional exercise of the regulation of commerce and was upheld in all points.

**The Suppression of Lotteries.**—Has Congress the power to set up other moral standards and prohibitions in interstate commerce? The original purpose of the regulative power was undoubtedly a business one, that is to give Congress control over national trade in order to prevent State interference. At various times in our history, however, such moral problems as the lottery, the white slave evil, and intoxicating liquors have attracted public attention and their suppression has been forcibly urged upon the Government. In 1895 Congress passed “an act for the suppression of lottery traffic,” which prohibited the sending of lottery tickets through the mails or from State to State by the ordinary channels of trade. Under this Act, C. F. Champion, alias W. W. Ogden, and others were prosecuted for having circulated in interstate commerce from Dallas, Texas, to Fresno, California, certain tickets or lottery shares of the Pan-American Lottery Company. In their defence they urged: First, that the suppression of a lottery was not an exercise of any power belonging to Congress; second, that the sending of lottery tickets was not an operation in interstate commerce; third, that the power to regulate lotteries and the sale of tickets was exclusively within the jurisdiction of the State government. It was claimed that the whole question of moral regulations of sale and purchase in such cases was intended by the Constitution to be governed only by the States and that Congress had exceeded its powers by the Act of 1895. The Supreme Court, in its decision, *Champion v. Ames*, 188 U. S. 321; 1903, overruled the defendant on all points and held that the power to regulate included the power to prohibit; that Congress being vested by the Constitution with full authority over commerce, could use that power to remove from commerce any objectionable or dangerous elements. The law under which *Champion* was convicted was held constitutional. Similar

Acts in 1897 forbidding interstate trade in articles intended for an immoral purpose and the circulation of improper literature have likewise been upheld. *Popper v. U. S.*, 98 Federal Reporter, 423, decided 1899.

**Pure Food Laws.**—A new and important side of the national control over interstate trade has developed in the Pure Food Laws. The adulteration of food, drugs and beverages has long been a matter of common knowledge. This adulteration was most widespread in the manufacture of whiskeys, wines, and other alcoholic beverages. By the addition of flavoring and coloring matters to various cheap compounds of alcohol, the manufacturer was able to produce any beverage at a low price and to market it under the general trade name of "whiskey," "wine," "brandy," etc. The practice soon spread to the adulteration of drugs, and it became customary to cheapen many standard articles, even those used in the preparation of medicines, by the addition of various ingredients of lesser cost. Nor did the process end here; it invaded the field of food production. The homely squash and the apple when doctored, flavored, colored, and attractively packed, became "preserved strawberries"; oleomargarine dyed yellow took on the semblance and name of "butter": strips of veal were metamorphosed into "potted chicken," while even those cereals which form the food mainstays of the poorest classes were not spared, but flour, corn meal, oat meal, etc., were all "blended" with siftings, cheaper meals and even mineral earths. The eagerness to put food production on a "commercial basis" had meanwhile invaded the meat-packing industry and animals were slaughtered under conditions which, mildly stated, were unsanitary, while many diseased or decayed meats were packed for sale to the trade.

With a few notable exceptions the whole field of manufactured food, drugs and drink production was honeycombed by these practices. Aside from the extensive fraud involved, the public health was threatened by the dangerous preservatives or adulterants used. When the reaction came, a great wave of popular feeling surged over the country, forcing Congress to take immediate action for the protection of all classes against the practices described. The legal obstacle at once arose,—what constitutional authority had Congress to regulate manufactured foods, drugs or adulterations? Obviously none whatever, for the Constitution does not mention manufactures. In the emergency it was decided to resort to the power to regulate commerce between the States. Two important laws known as the Food and Drugs Act and the Meat Inspection Act were passed and approved June 30, 1906, to prohibit *the circulation in interstate trade* of all fraudulent and unhealthful foods, drugs, beverages and meats, that is those which are not prepared according to the rules and standards authorized by Congress. These rules are as follows:

**Meat Inspection.**—All meats slaughtered for interstate trade

must be carefully examined by a Federal inspector before slaughter; the carcase is also examined after slaughter and stamped as "passed" or "condemned,"—those meats which are packed or canned must also be inspected and marked and finally the slaughtering establishment itself must have been examined and approved. Animals and carcasses which show certain dangerous diseases must be destroyed, others which are only partly affected may be used in part. The cost of inspection is borne by the Government. To avoid collusion or temptation the inspectors are frequently moved from one establishment to another; they are appointed by the Secretary of Agriculture who has charge of the execution of the law.<sup>1</sup>

**Food and Drugs Act.**—This law is aimed to prevent adulteration and misbranding; it prohibits the use of deceptive labels on both food and drugs; medicines which contain alcohol, laudanum, and other dangerous ingredients shall have the proportion of such ingredients plainly stated on the wrapper and label; it further requires that all drugs shall conform to the standard of purity fixed by the national pharmacopœia.<sup>2</sup>

In the protection of foods it prohibits the use of harmful preservatives and the adulteration of any food product by the addition of other ingredients, unless the composition is so marked on the label; one product may not be sold under the name of another; the law also applies to beverages. The enforcement of the Act is entrusted mainly to the Bureau of Chemistry of the Department of Agriculture, which collects and analyzes samples of foods and drugs circulating in interstate trade. If such samples prove to be manufactured contrary to the law the manufacturer is immediately notified and allowed to present a full statement, and in case a serious violation of the law has taken place, the evidence is presented to the Department of Justice for prosecution. Where the violation is not an important one no prosecution is begun except in case of repeated failure to observe the spirit of the law. Each factory is given a registered number which is printed on the label of the product. A very detailed set of regulations for the enforcement of the law has been drafted by the Secretary of Agriculture, the Secretary of the Treasury and the Secretary of Commerce and Labor. The more progressive manufacturers have been quick to see the benefit and importance of government inspection and many of them advertise the fact of such inspection of their products, while still others point out that they observe a standard even higher than that required by the government.

The immediate practical effects of these two Acts have been more beneficial than those of any other two laws passed within a generation. It is not too much to say that the food and drug manufacturing industries have been revolutionized and that the basis of competition in those businesses has been so changed that purity

<sup>1</sup> See the annual report of the Bureau of Animal Industry.

<sup>2</sup> See the annual report of the Bureau of Chemistry.

of product is now an advantage instead of a commercial handicap. The effects on the public health are not easily ascertained but are none the less important, in that cleanliness, greater strength of nutrition and purity are now insured.

For a time the Food and Drugs Act failed to protect the public against fraudulently labeled patent medicines. Section 8 of the law of 1906 provided that a drug or article of food should be considered misbranded, and therefore debarred from interstate commerce, if the package or label "shall bear any statement, design or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular." Although this language seemed clear and definite, it was curiously construed by the Supreme Court in a noted case, as meaning only false statements as to which substances or ingredients were contained in the food or drug. The decision in *U. S. v. Johnson*, 221 U. S. 488; 1911, which established this doctrine, threatened to curtail seriously the usefulness of the Act. Johnson manufactured a "cancerine" remedy and "Dr. Johnson's Mild Combination Treatment For Cancer," which was represented as a cure for cancer. It was found to be nothing of the sort. When prosecuted, the defendant did not deny that the claims made for the "treatment" were fraudulent but rested his defence on the ground that he had made no false statement as to the ingredients contained.<sup>1</sup>

Upon appeal of the case to the Supreme Court, it was ruled that Congress, in the Food and Drugs Act, did not intend to pass upon the merits or curative powers of any medicine circulating in interstate commerce. These supposed remedial qualities were matters, said the Court, on which there might be the widest difference of opinion: Congress accordingly had meant only to prevent the label and wrappings from misrepresenting the *ingredients* which made up the drug, but not in any way to regulate the statements which might be made as to their curative power. Justice Hughes, in a strong dissenting opinion, pointed to the language of Section 8: "any statement, design, or device regarding such article"—but the majority of the Court held against the government and in favor of the company. If the cancerine decision so rendered had been allowed to stand, it would have been possible for the proprietors of patent medicine nostrums and fraudulent "cures" to circulate their products freely in interstate trade and to continue the long-standing abuses and imposition upon the credulous and ignorant. In 1912, however, the Act was amended in order to prevent frauds of this nature. Clause 3 of Section 8 of the law now declares that a drug shall be held to be misbranded and debarred from interstate

<sup>1</sup> As to these ingredients the Supreme Court said in part: "It may be, we express no opinion on that matter, that if the present indictment had alleged that the contents of the bottle were water, the label so distinctly implied that they were other than water, as to be a false statement of fact concerning their nature and kind."



trade, "If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent." This strikes at the root of the patent medicine evil by forbidding those misstatements and claims of marvellous curative power which in the past have enabled the unscrupulous to trade on the credulity and hope of the afflicted. A number of important prosecutions have been begun against certain widely advertised patent medicines, under this clause, and the manufacturers implicated have in most instances admitted their guilt and revised their extravagant claims accordingly. This simple addition of a dozen words to the Food and Drugs Act by the Sherrill Amendment of August 23, 1912, together with the subsequent vigorous enforcement of the law, has probably done more to protect the public from fraudulent medicines than any other measure that could have been taken.

**The Net-Weight Act.**—The Food and Drugs law did not prevent false statements of quantities contained in packages of food or medicine. This custom had meanwhile reached the proportions of a general abuse and fraud. A 10% reduction in weight of food or medicine packages is simply an increase of 10% in the price of the product and no little part of the higher cost of living is due to this almost universal practice. In order to meet this situation, Congress added to the Food and Drugs Act on March 3, 1913, the provision that all packages shipped in interstate commerce shall be plainly and conspicuously marked to show the quantity of the contents. While it is not an easy matter to enforce this clause owing to the natural shrinkage, variation of containing packages and honest mistakes in weighing, measuring and counting, yet the effect of the measure has already been most salutary and a marked improvement is noticeable in this important side of interstate trade.

**The Practical Methods of Enforcing the Act.**—As the success of the Food and Drugs laws depends chiefly on the vigor with which the administration enforces them and the funds placed at the disposal of the executive for their execution, it is well to examine the side of the problem here. In the words of the chief of the Bureau of Chemistry of the Department of Agriculture, the work of the Bureau consists of three chief main lines.

(1) **Inspection.**—The enforcement of the food and drugs act, which is designed to regulate the interstate shipment of foods and drugs which are adulterated or adulterated, or offered for sale under misleading labels. The Bureau of Chemistry gives assistance to the Interstate Commerce Commission by making analyses, holding hearings and issuing subpoenas.

(2) **Regulation.**—The enforcement of specifications for pure substances which are used in interstate commerce by the United States Government, and to the extent that supplies furnished are in accordance with the specifications.

"(c) Investigational.—This work is of two types; the first serves more purely regulatory purposes and includes such investigations as the search for new forms of sophistication, the development of methods for the detection of adulteration, and the discovery of the cause and source of contamination in foods. The second type consists of constructive work looking to the development of new uses, sources, and methods of preparation of foods and drugs with reference to the conservation of the food supply, the prevention of waste, and the utilization of waste by-products. This type of work includes necessary investigations in analytical, agricultural, and biological chemistry. The two types of investigation merge into each other. An investigation undertaken solely for regulatory purposes often discloses facts which lead to constructive work of great importance and vice versa."

The number of inspectors, however, is only 44 which, in view of the immense field to be covered and the importance to the community of the work done, is totally inadequate. During a single year these 44 men collect over 10,000 samples for examination and visit many thousand manufacturing establishments. For economy's sake they are concentrated in a few centers, making field trips to the territory around them. In addition to the main central laboratory, there are now 21 branch laboratories. The scope and importance of the inspectors' work may be seen from a short recital of some of their ordinary routine duties. At one time they pay especial attention to the preparation and shipment of milk from those sections which have no local milk inspection service, particularly the small towns adjacent to great cities. At another time they study the water of those sections in which shellfish are caught in large quantities, with a view to detecting and preventing the causes of disease. Again they investigate the many attempts made to bleach food products such as flour with injurious chemicals and stop the practice. Or they find that in the milling industry it has become a custom to add screenings and mill refuse to the animal foods sold as by-products of the mill. Many illegal shipments of such adulterated animal foods have been seized. On another occasion they find a misbranding of wines and malt liquors, or the importation of spurious brandies, or the simple dilution of ethyl alcohol to be sold as Russian vodka. The Bureau learns that great quantities of Italian tomato sauce and tomato paste are being imported. A representative is sent to Italy to confer with the manufacturers there, inducing them to adopt sanitary methods which will satisfy the requirements for importation. The Bureau discovers a wide-spread practice of sweating unripe citrus fruits to give them the color of maturity. It brings suit in the courts, thereby putting an end to the practice. It finds that large quantities of physicians' supplies, which are marketed direct by the manufacturers, were adulterated or misbranded. A special inquiry was conducted which also stopped this dangerous practice.

In all this great and varied field of labor the Bureau has performed a signal service both to the manufacturer and to the community at large. Its inspectors have not acted merely as detectives to spy out violations of the Act and punish the malefactors, but have frankly recognized that many illegal practices were unintentional, while others resulted from a mistaken commercial zeal. They have accordingly admonished, instructed, and advised quite as often as they have prosecuted. The shippers of milk have been taught greater cleanliness and have been prosecuted only when they failed to follow suggestions. The grape juice producers have been aided by a field laboratory in which the methods of preventing the formation of alcohol are studied and perfected. The poultry and egg raisers have been instructed by a model refrigerator car showing the best methods of care and preparation of their products and especially pointing out the importance of immediate cooling of poultry and eggs before storage. The sanitary preparation of frozen and dried eggs has been demonstrated. New methods of preventing the formation of arsenic and metallic impurities of copper, zinc and lead in gelatin have been developed, and in the important process of canning an exhaustive study has been made of the possibilities of improvement.

Furthermore the law itself has not been enforced in the courts by heavy penalties. The producer, unless he shows a determined and persistent spirit of violation, is handled with the greatest leniency and is usually allowed to go free of all penalties upon signing a bond for the future observance of the law and paying the very moderate court costs. The result of this praiseworthy spirit in the administration has been a remarkable improvement in food conditions in all sections of the country and it cannot be doubted a much greater benefit would follow an extended and more adequate appropriation for the needs of the service.

In meat inspection and in the Bureau of Animal Industry of the Department of Agriculture the need of more funds is even greater. The work of meat inspection is seriously hampered by inadequate appropriation. In a matter so vital to the public health there can be no excuse for the mistaken policy of economy which the national legislature has followed towards these bureaus.

The National Food and Drug Act cannot be interfered with by any State statute; on the contrary its authority extends over all shipments of food and drugs down to the time when they reach the retail purchaser. In *McDermott v. Wisconsin*, 228 U. S. 115; 1913, the State had attempted to follow the early original package decisions by providing regulations of its own governing the labelling of packages placed on sale *at retail* within the State. While general State regulation might have been permissible in this way under the former decisions, yet the effect would have been to repeal the Federal regulations as to the labels on packages of products which had passed in interstate trade. If Wisconsin could prescribe what

labels should go on retail packages, then the Federal law requiring net weight to be stated on the packages, and requiring the labels to contain a statement of the presence of certain harmful drugs, or defining misbranding or adulteration, would all have been swept away from retail trade and would have been confined solely to the labels of the outer or original packages in interstate commerce. But these original package labels never reached the customer's eye. Congress has therefore insisted that the labels which do come to the customer's attention on the retail packages shall be under Federal control. In the McDermott case the defendant who was prosecuted under a Wisconsin law, claimed that the Congressional power was supreme even over such retail labels, while the State maintained that after the original package of interstate commerce was broken, the State authority became supreme, since the package had then entered intrastate trade. The Supreme Court rejected the State's contention and upheld the supremacy of the Federal regulation. The decision established in substance the following principles: that as the Federal Act requires articles in interstate commerce to be properly labelled, a State cannot require a label which has been properly affixed under the national statute to be removed and other labels authorized by its own statute to be attached to the package containing the article, so long as it remains unsold by the importer, whether it be in the original case or not. And that the early doctrine of original packages was not intended to limit the right of Congress, when it chose to assert it, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles and to choose appropriate means to that end.

**New Problems in the Federal Police Power over Commerce.**—Can Congress use its regulative power for any purpose that it pleases? This broad question has been brought up by the introduction of a national child labor bill, providing that the products of factories employing children under the age of fourteen should be debarred from interstate trade. The measure, originally introduced by Senator Beveridge, has been more recently urged with some insistence. It raises also the question as to how far the Federal regulative power may be employed in such a way as to interfere with businesses conducted within a State. Two sharply dissident views have emerged from the discussion. Senator P. C. Knox in congressional debates and public addresses<sup>1</sup> has pointed out that the regulative power was given to Congress for the purpose of further aiding and promoting national trade but not to interfere with the internal affairs of a State. He contends that any attempt to carry out the latter purpose is beyond the authority of Congress. "But it is claimed that as the power to regulate commerce is absolute, complete and mainly exclusive in Congress, the right to forbid the shipment in interstate trade of any kind of goods, for any reason,

<sup>1</sup> See Address to Graduating Class, Yale Law School, June 24, 1907.

comes within that power. That is to say, under the guise of a commercial regulation, not necessary for the promotion or protection of commerce, a producing regulation, which Congress could not have enacted, may be enforced; or, in other words, Congress can deny a person the right to engage in interstate commerce for doing that which Congress cannot prohibit him from doing. . . . In my judgment, the power to regulate commerce between the States does not carry within it the power to prohibit commerce, unless the prohibition has for its purpose the facilitation, safety or protection of commercial intercourse, or the accomplishment of some other National purpose. The power to regulate interstate commerce does not extend to the laying of an arbitrary embargo upon the lawfully produced, harmless products of a State, nor to the right to defeat the policy of a State as to its own internal affairs. I concede that the National power to regulate interstate commerce carries with it the right to prohibit commerce in order to secure equality of commercial right, or to prevent restraint of or interference with commerce, but not to prohibit the shipment from the State of the innocuous products of producers who are pursuing a course sanctioned by the laws of the State and in no wise in itself interfering with interstate commerce."

The opposite view is represented by Donald Richberg, of the New York bar, who sets forth a much broader interpretation of the Federal power. He holds that just as Congress has the undoubted authority to free interstate trade from such obstacles, hindrances and injurious or harmful elements as combinations in restraint of trade, unsanitary meats, harmful or fraudulent foods and persons or objects transported for immoral purposes, so it has the full power to bar out from national commerce the elements of unfair competition. One of these is the employment of child labor. In its efforts to protect the producer and the whole community from unfair competition, Congress has forbidden the formation of monopolies. Can it not, in pursuance of the same high purpose, forbid the participation in national trade of those who seek to undermine competition by equally reprehensible means; namely, the employment of children of tender age? Neither of these view-points has yet received the final stamp of approval of the Supreme Court but the more advanced point of view seems to offer opportunities for the advantageous extension of Federal power, and has been closely approached by the Court in its decisions on the Mann Act, already described.<sup>1</sup>

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<sup>1</sup> Hoke and Economides v. U. S., 227 U. S. 308; 1913.

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### QUESTIONS

1. If the Federal Government has no authority over manufactures what power has it to pass a pure food law, or a meat inspection act?
2. Why were such acts passed, in 1906?
3. Outline the chief features of the food and drugs act.
4. Explain what is meant by misbranding under the act.
5. By adulteration.
6. The Pure Candy Company manufactures bon bons containing brandy. It labels the box simply "bon bons." Has the act been violated? Explain.
7. It colors other bon bons with chrome yellow. Is this legal? Reasons.
8. A manufacturer labels his product "preserved strawberries." It contains 60% of strawberries, the balance being squash and apple. Has he violated the act? Explain.
9. A manufacturer of breakfast foods located in Chicago prepares a mixture of Minnesota oats and labels it "Edinburgh Scotch Breakfast Oats"; he makes another mixture of dried corn flakes with sugar and labels it "Elijah's Manna"; a third he makes from a good quality of wheat flour and labels it "Buckwheat Brain Builder." He sells these to the trade in various parts of the country. Explain fully the legality of each label.
10. The government prosecutes a drug manufacturer for adulterating his camphor sold to the trade. What standard will be used to measure the purity of the drug?
11. Wisconsin passes a law regulating the labels of packages offered for sale at retail within the State. This conflicts with the labels prescribed by the Federal Government for goods sold in interstate trade. Which law takes precedence on packages exposed for retail sale in Wisconsin? Reasons.
12. In 1911, Dr. Quack circulated in interstate trade his Magic Consumption Cure. The label and wrapper say nothing of the ingredients but both guarantee a sure cure for consumption if the remedy is taken persistently, a teaspoonful after each meal. Upon analysis, the cure is found to contain one part of salt and ten parts of water. Has the law been violated? Explain fully.
13. In 1914, Dr. Quack continues his sales of the remedy under the same conditions. Can he be prosecuted? Explain fully.
14. Explain the provisions of the Net-weight Act.
15. You are about to enter the business of slaughtering and packing of meat products for interstate trade. Explain fully the inspections to which your business would be subjected by the Federal Government.
16. Has Congress any authority to regulate morals in connection with interstate trade?
17. The U. S. law prohibits the circulation of lottery tickets in interstate commerce or through the mail. John Doe sends a package of such tickets by Parcels Post to another State. When prosecuted he pleads the Fifth Amendment. Decision of court, with reasons.
18. He urges in his defence that lottery tickets are not objects of "commerce" in the sense of Section 8 of Article I. Decide with reasons and cite a precedent.
19. Can Congress exclude from national commerce, articles which are not injurious nor intended for an improper purpose? Reasons.
20. A manufacturer prepares for interstate shipment, a lot of goods which may not circulate in interstate commerce under the law, and leaves them in his shipping room, sending meanwhile for the Express Company. Has he violated the act?
21. The goods are placed on the train for shipment to another State, but the train has not yet reached the State boundary. Has the act been violated?
22. He delivers them to the express company which takes them to its depot,

but has not yet placed them on the train. Has any violation of the Act occurred?

23. Outline briefly the educational work among manufacturers and other producers carried on by the bureau of chemistry.

### QUESTIONS ON IMMIGRATION

1. What constitutional authority has Congress over immigration?
2. Enrico Alfano migrates from Naples to New York. What tax is imposed upon him on entrance and from whom is it collected?
3. Which of the following persons are excluded from the United States under the Immigration Act—give the provisions of the act covering each case:
  - (a) John McGinniss, an epileptic invalid.
  - (b) Mary McGinniss, an idiot.
  - (c) Wm. McGinniss, aged 30, who has had several attacks of insanity, but is now in possession of a physician's certificate stating that he is sane.
  - (d) Philip McGinniss, who was insane three years ago but who has now a physician's certificate as to sanity.
  - (e) Jacob McGinniss, who has no dangerous contagious disease, but is blind, friendless, and penniless.
  - (f) Michael McGinniss, who has served out a term in prison for manslaughter.
  - (g) Antonio Bonato, who has been convicted of a trifling misdemeanor in Naples, but has been allowed to go free and his passage paid to America by the city of Naples.
  - (h) Paolo Lombardi, who has been engaged by the Columbus Coal Company to work in its mines and E. Caruso, who has been engaged by the Metropolitan Opera Company to sing in New York and Philadelphia.
4. The cost of supporting certain excluded persons is \$920. Who pays it? Suppose it is not paid as required by law, what can the government do?
5. What does the act provide as to the way in which they shall be deported?
6. John Nomunno becomes a pauper and enters the alms house two years after his immigration to New York. What does the act provide as to his cost?
7. Could Congress forbid all immigration for five years? Reasons.
8. Could it prohibit all immigration permanently?
9. Explain the Federal Government's special protection to women in interstate travel by the Mann Act of 1910.
10. Explain fully the constitutional basis of the arguments made by the defense in *Hoke and Economides v. U. S.*
11. Congress forbids the entrance to this country of certain undesirable aliens. Such an alien having lived here for six years goes back to his native land for a short time and then seeks to re-enter the United States. Can he be legally excluded?
12. Could Congress constitutionally attack a business which it considers immoral, such as stock gambling and speculation, by forbidding the passage through the mails or by interstate telegraph or telephone of messages and orders for the purchase of stock on exchanges which were not incorporated according to certain rules?
13. Senator X introduces a bill excluding from interstate trade the products of factories in which children under 14 are employed. Give the arguments for and against its constitutionality and your own views on the subject.

## CHAPTER X

### POWERS OF CONGRESS—Continued THEIR RELATION TO STATE POWERS OVER COMMERCE

**The Original Rule on State Powers.**—Having examined the authority of Congress over national trade, and having seen that it is absolute and unquestioned, we shall now consider how far a State government can control commerce. Briefly, it may regulate that which is entirely within its own boundaries and may exercise a limited control even over interstate trade in certain cases, subject to the tacit consent of Congress. Its authority over national commerce has been a matter of gradual growth through a series of important Supreme Court decisions, of which a few may be briefly mentioned. The first rule established was that no State could interfere in national trade. The question at issue was the grant by a State of a monopoly of steam navigation which, the owner contended, barred out all other steam vessels from the use of the State ports. Fulton and Livingstone, as a reward for their services in inventing and perfecting the steamboat, had received from New York such a monopoly of steam-navigation in the waters of that commonwealth. They sold the right to another person who tried to enforce it by preventing all other steamboats from entering the ports of New York from other States. The owner of a steam vessel plying between New Jersey and New York resisted this action and in 1824, in the celebrated case of *Gibbons v. Ogden*, 9 Wheaton, 1, the United States Supreme Court decided that no State could grant a monopoly affecting *interstate* trade because the Constitution had given Congress the power to regulate that trade. The monopoly therefore could only apply to waters entirely within the State of New York and not to those which formed avenues of interstate traffic. A similar ruling was delivered in the case of *Brown v. Maryland*, 12 Wheaton, 419, in 1827. Here the State had levied a tax on importers in the form of a business license of fifty dollars. The Court held this license unconstitutional in that it interfered with importing or *foreign commerce*. If these decisions had stood without further change the States would have had no control whatever over national commerce.

**The Rise of State Power.**—The entering wedge of State authority was driven in the case of *Cooley v. The Port Wardens of Philadelphia*, 12 Howard, 299, in 1851, and a new interpretation was given to the commerce clause. The Supreme Court declared that



although Congress had full power of control there were certain detail matters of such a local nature that Congress might permit the States to regulate them. One of these was the question whether pilots were necessary for ships entering and leaving a local port. So long as Congress permitted it, a State might require, as Pennsylvania had done for Philadelphia, that all ships coming into the local harbor must take on a pilot, for safety, and that this pilot must be paid at a fixed rate. The State might even impose a fine for the violation of this pilotage rule. Other similar matters of a local nature which are subject to State regulation until Congress acts, are the placing of harbor buoys, anchorage rules, harbor lights, etc. A further extension of State power took place in the case of the *Escanaba Company v. Chicago*, 107 U. S. 678, decided in 1882. Here the city of Chicago had provided for the closing of certain drawbridges over the Chicago River (a channel of interstate commerce), for ten minutes at a time in order to allow of street traffic across the river. The closing of these drawbridges interfered with the passage of boats of the *Escanaba Company*, engaged in interstate business, and was accordingly resisted by the company in the courts. The Supreme Court decided that the two currents of traffic which met at the Chicago River, one being the interstate traffic by boat through the river itself, and the other being the street traffic of a great city lying on both shores of this river, constituted a *local* question which might best be regulated by local ordinances in the absence of any action of Congress. As the city of Chicago lay on both sides of the river, it was only natural that the municipal government of Chicago, under authority from the State, should make such reasonable regulations as would best conduce to the forwarding of both the river and street traffic. This the city had apparently done by its rule closing the bridges every ten minutes. Since Congress had not regulated the matter, the rules provided by the city of Chicago were therefore held to be justifiable and constitutional even though they directly affected the interstate commerce in which the *Escanaba Company's* boats were engaged. Congress by its constitutional authority could at any time repeal these rules and supersede them by others of its own making. The Act of Congress of 1899 now provides that no bridges may be constructed across navigable interstate waterways without the express consent of the Federal authorities.

An excellent summary of the powers of the States as interpreted by the Supreme Court is given by Justice Field in *Bowman v. Chicago Railway Company*, 125 U. S. 507; 1888,—“Where the subject upon which Congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers and docks, and the like, which can be properly regulated only by special

provisions adapted to their localities, the State can act until Congress interferes, and supersedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free."

**Proper and Improper Uses of the State Power over Interstate Trade.**—The care which the Court formerly exercised in allowing State regulation of local matters which affected national business may be seen in the *Husen Case*. In 1872, Missouri passed a law forbidding the driving, or conveying into the State, of any Texas, Mexican, or Indian cattle between March 1st and November 1st in each year. The ostensible purpose here was to protect the health of Missouri cattle from Texas, or Spanish fever. But the Supreme Court, in *Railroad v. Husen*, 95 U. S. 465; 1877, decided that this prohibition was too general and absolute; that it did not offer a reasonable means of keeping out diseased cattle but rather, through eight months of the year, excluded the importation of all, and was for that cause an excessive regulation, or prohibition of interstate commerce. While a State may enact sanitary laws and for the purpose of self-protection establish quarantine and reasonable inspection regulations, and prevent persons and animals having contagious diseases from entering the State, it cannot, beyond what is absolutely necessary for self-protection, interfere with transportation into or through its territory.

**State Regulations of Safety.**—How far may the State go in protecting the safety of its people in matters of interstate commerce? The general principle now governing this question is that, until Congress has acted, a State may intervene even in interstate trade to protect the lives and safety of its people, unless its regulation is of an unreasonable nature. In *New York, New Haven and Hartford Railroad v. New York*, 165 U. S. 628; 1897, the State had passed an Act forbidding the use of coal or wood stoves on passenger coaches in the State and had sought to apply this act to the New Haven line. This the company protested, claiming that it was engaged in interstate traffic and that its through trains could not be interfered with by the State, but must be regulated only by Congress under Section 8 of Article 1. The Supreme Court, however, ruled that the State authority when used in this way was constitutional; the purpose of the Act was to prevent the burning of coaches in train wrecks, and the consequent loss of life and property. For such a purpose, the State might, in the absence of action by Congress, make reasonable regulations to require the railways to use modern heating apparatus of a safer nature; and the New York Act was a reasonable rule of this kind which

might well be applied even to interstate trains, until Congress acted.

A similar ruling had already been made in *Smith v. Alabama*, 124 U. S. 465; 1888. Here the State had established a Board of Examiners to license locomotive engineers; it required all engineers to pass an eye examination to secure such a license before driving a train in the State. A fee of \$5.00 was to be paid for the examination and the license; persons who were known to be negligent and incompetent were disqualified, as were also those who were intoxicated within six hours of going on duty. A penalty of fine or imprisonment was visited upon those who violated the Act. Smith was an engineer of the Mobile & Ohio Railroad who, it was shown, did not drive an intrastate train, but whose run was exclusively in interstate commerce; being approximately 60 miles within the State of Alabama and over 200 miles in Mississippi. For this reason he claimed immunity from the State rule, and contended that he could not be required to secure a State license to engage in interstate commerce. The Supreme Court upheld the State statute and set forth that the purpose of the rule was clearly to protect passengers and property from careless and incompetent engineers and railway accidents. The fee of \$5.00 was not a tax on interstate commerce, but was a proper charge for the expense of examination and license. The State might apply the requirements above described, even to engineers making an interstate run, part of which lay within Alabama, so long as the law was a reasonable and proper requirement in the interests of safety. The Act was not intended to, nor did it obstruct interstate commerce. It is to be observed that the Court would probably have declared the State law unconstitutional if it had imposed a heavy license fee, or onerous and burdensome restrictions on those who tried to secure a license; but as neither of these defects existed, the law was allowed to stand as a reasonable statute.

Again in *Patterson v. Kentucky*, 97 U. S. 501; 1878, a similar principle had been established in another field analogous to interstate commerce. Kentucky had passed an Act regulating the sale of illuminating oils in the State and providing that no oil which ignited at a temperature below 130 degrees Fahrenheit should be offered for sale within the State. All oils were to be inspected and the casks branded by a State official, as "standard," or "unsafe." Patterson sold an oil which ignited below the standard test and which had not been passed by the State inspectors. He claimed that the oil was manufactured under a Federal patent and that the patent right gave the inventor the privilege of selling his product without interference by a State law. He further argued that if a State could so interfere with the sale of a patented article, it might render valueless the patent and thereby defeat the national laws on patent rights. The Supreme Court overruled this contention and decided that the State law was a reasonable and proper measure to

prevent explosions and loss of life and property. A safety measure of this nature was not intended to defeat the national patent acts, but had the purpose and effect of protecting the local community from conditions that would otherwise be intolerable. The Court took occasion to point out that the national government had long possessed full control over interstate trade, yet the States were allowed to protect their people against dangerous conditions arising in such commerce while within their borders. "By the settled doctrines of this Court the police power extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights. State legislation, strictly and legitimately for police purposes, does not, in the sense of the Constitution, necessarily trench upon any authority which has been confided, expressly or by implication, to the national government." Speaking of interstate commerce the Court said, "This court has never hesitated by the most rigid rules of construction, to guard the commercial power of Congress against encroachment in the form or under the guise of State regulation, established for the purpose and with the effect of destroying or impairing rights secured by the Constitution. It has nevertheless, with marked distinctness and uniformity, recognized the necessity growing out of the fundamental conditions of civil society, of upholding State police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health, and property, which each State owes to her citizens."

**State Laws to Prevent Fraud.**—In *Plumley v. Massachusetts*, 155 U. S. 461; 1895, the State was allowed to prohibit the sale of oleomargarine imitations of butter, colored to represent the genuine article, even when such imitations were imported from another State and offered for sale in the original 10-lb. packages. This is the farthest limit of local regulation of national trade which has been permitted by the Court. It was based on what the Court considered to be the State's essential right to protect its citizens from fraud. The Court did not doubt the healthful qualities of the product, but held rather that persons who wished to buy butter should not be deceived by another product falsely colored to represent butter. "Now, the real object of coloring oleomargarine so as to make it look like genuine butter is that it may appear to be what it is not, and thus induce unwary purchasers, who do not closely scrutinize the label upon the package in which it is contained, to buy it as and for butter produced from unadulterated milk or cream from such milk. The suggestion that oleomargarine is artificially colored so as to render it more palatable and attractive can only mean that customers are deluded by such coloration, into believing that they are getting genuine butter. If anyone thinks that oleomargarine, not artificially colored so as to cause it to look like butter is as palatable or as wholesome for purposes of food

as pure butter, he is, as already observed, at liberty under the statute of Massachusetts to manufacture it in that State or to sell it there in such manner as to inform the customer of its real character. He is only forbidden to practice, in such matters, a fraud upon the general public. The statute seeks to suppress false pretences and to promote fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it really is, by preventing its sale for what it is not. Can it be that the Constitution of the United States secures to anyone the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the States demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country?" There was a strong dissenting opinion in this case by three of the Justices who contended vigorously that the State was interfering with sales in the original packages, a power which only Congress could exert. The decision, however, was followed subsequently in all regulations of oleomargarine up to the passage of the Food and Drugs Act of 1906. It is still important as showing the State's power over national trade to prevent fraud. But where the statute is more extended in its language, and excludes from sale within the State *all* oleomargarine (regardless of whether colored to imitate butter or not), the State clearly oversteps its authority. This was the ruling in *Schollenberger v. Pennsylvania*, 171 U. S. 1; 1898. Here the State law prohibited all manufacture or sale of oleomargarine within the State. Schollenberger was a dealer who received a forty-pound tub of the product from a manufacturer in Rhode Island, and exposed it for sale as an original package. It was properly marked as required by the Act of Congress, and was not colored to imitate butter. When prosecuted under the Pennsylvania law Schollenberger contended that the product being a wholesome one, and one recognized and regulated by the Federal law, he had a right to deal in it in original packages in interstate commerce, so long as he practiced no fraud by misrepresenting it, and so long as it was not given a deceptive appearance to mislead any prospective purchaser of butter. This the Court upheld, declaring that oleomargarine, being an article of commerce, could be brought into a State in the original package and sold in that package, regardless of State prohibitions, so long as it was not deceptive or fraudulent in appearance. The essential difference between these two cases is that the Massachusetts law prohibited fraudulent sales or sales of an article intended by its appearance to deceive, while the Pennsylvania Act forbade all sales of a certain product, regardless of its wholesome quality and genuineness, or absence of deceit and fraud. The Massachusetts Law when applied to sales of goods in interstate

commerce was upheld, while the Pennsylvania Act when so applied was declared unconstitutional. These rulings show clearly the proper and improper uses of State regulation of Interstate Commerce.

**State Regulations for Public Convenience.**—In addition to State regulations of health, safety and fraud, which have been upheld as constitutional even when they affect interstate commerce, a State may also make rules for the public convenience and may promote the better service of public utility corporations, even though, in so doing, it touches on interstate traffic. This principle is best illustrated by two companion cases decided in 1899 and 1900. The first was the *Lake Shore & Michigan Southern v. Ohio*, 173 U. S. 285; here the legislature of Ohio had passed a law requiring railways in the State to stop at least three trains daily, each way, at all cities and stations on the lines of the railway with a population of 3,000, or over. The Lake Shore refused to stop one of its fastest trains at a suburb of Cleveland which had the required population, and the local authorities claimed that, as the town was not given three trains daily each way, the railway had violated the Act. The company answered that its through train was an interstate affair which could not be regulated by the State government and that the local law was therefore unconstitutional as applied to trains passing to or from other States. The Supreme Court decided, however, that as the company did not furnish adequate or reasonable train service for the point in question it must stop a sufficient number of trains to give such service. The company was free to offer three trains daily from its local traffic, if it preferred; but failing to do this, it could be required by the State, for the convenience of the people, to stop through trains even though these latter were engaged in interstate trade. If the company had established a sufficient number of local trains, that is, three daily, the Court would doubtless have held that the interstate schedule could not be interfered with. This decision, therefore, establishes simply the rule that a State may require reasonable service for its larger towns and villages and that if a company fails to provide such service from its local trains, the interstate schedule may be called upon.

The companion case on this point brings out the question very clearly. In *Cleveland, Cincinnati, Chicago and St. Louis Railway v. Illinois*, 177 U. S. 514, which was decided the following year, the Illinois law required *all* regular passenger trains each way to stop at county seats on their line. The railway already furnished four regular trains stopping at the county town in question, Hillsboro, and these were sufficient to accommodate all the local traffic. The railway also operated a "Knickerbocker Special" from St. Louis to New York, passing through Illinois, but not stopping at the county seats. The State authorities having demanded that this through special should stop at county seats, the company

contended that such action would interfere with its connections and overturn its schedule, which would result in the loss of passenger traffic and drive the business to other competing railways. In deciding the case, the Supreme Court recognized the active competition between carriers, not only in the comfort, convenience and general excellence of through trains; but also in the running time of their schedules. It was essential that the interstate schedule be free from local interference unless the company was to lose a large part of its business to other lines which were not restricted in their running time. This was especially true where the local train service was adequate to the demands of the county seats. A State law regulating through trains, regardless of the interests of other States would be a serious burden on national commerce and defeat the commerce clause which granted the regulative power to Congress. "After all local conditions have been adequately met, railways have the legal right to adopt special provisions for through traffic, and legislative interference therewith is unreasonable and an infringement of the Constitution." In all such cases of local regulation it must be clear that the State is not setting up an unreasonable obstacle to interstate trade. This element of reasonableness is more clearly defined in the *Atlantic Coast Line v. The Railroad Commissioners of South Carolina*, 207 U. S. 328; 1907. Here the Supreme Court outlined sharply the limits of State interference with through trains in interstate commerce. The Atlantic Coast Line operated several through trains between New York and Tampa, Florida. These made connections with the steamers to Havana and were also in active competition with another through line to the South. During the winter season, the passenger traffic required high speed and high-class accommodations. A fast schedule was also required by the mail contracts. Notwithstanding these facts, the South Carolina Railroad Commission ordered the Coast Line to stop its fastest train each way at Latta, South Carolina, a hamlet of 453 persons. The railway protested against this order, the case came into the courts and eventually to the Supreme Court. It was shown in favor of the order, that besides the population of Latta, there were other persons in the surrounding districts which relied on Latta for their train service, amounting in all to about 1,200 souls. And it was argued that the convenience of this population required the stopping of an additional train and that several complaints had arisen because of the railway's failure to do so. In favor of the company, however, it was shown that there were numerous local trains stopping at Latta and one through train daily, each way. It was also possible to take a local train to a station twenty miles away, at which the fast train in question made a stop. Upon inquiry by the lower court as to the exact amount of inconvenience arising from the refusal of the company to stop its fastest train at such a small station, one witness replied that there were many complaints and a large number of persons

who wished to take the fast train at Latta; but, being pressed for exact figures, he said there were sometimes as many as four in one week. Upon this complete statement of facts, the Supreme Court ruled that, as long as the hamlet was well supplied with local train service and was already given one through train stop, a further order by the State to stop the fastest interstate train on the road would be an unwarrantable and unconstitutional interference with such traffic, under Section 8 of Article I. These cases show clearly the Court's willingness to ascertain all the facts of train service and accommodations, and upon the basis of these facts to judge of the reasonableness of a State rule which affects an interstate train.

**State Wage Laws Applied to Interstate Companies.**—In *Erie Railroad v. John Williams*, 233 U. S. 685; 1914, the State of New York was allowed to require the semi-monthly payment of the wages of railway employes, even when this applied to interstate railways employing persons wholly or partly within the State. The New York Act of 1907-8 was passed with the purpose of protecting employes from the practice of withholding wages for a considerable time. It aimed to secure a reasonable frequency of payment, and to this end it provided that railway and certain other companies must pay their employes in cash, that no part of the payment should be in store orders, and that payment should be made semi-monthly. Williams was the Factory Inspector charged with the enforcement of the Act. The Erie Company claimed that the interstate law could not apply to those of its employes who were engaged in duties connected with interstate commerce, and particularly not to those who were employed partly in New York and partly in other States. The company contended that such an application of the law would violate the commerce clause of the Constitution by interfering with the Federal power over interstate trade. The Supreme Court rejected the company's contention, and upheld the law on the ground that such a burden as it imposed upon interstate commerce was negligible and indirect. This slight burden, the Court commented, might be removed at any time if Congress chose to regulate the matter, but meanwhile the State might properly protect the interest of its residents by legislating on this question. "It is not necessary to review and compare the cases in which this court has pointed out the difference between a direct and indirect burden of state legislation upon interstate commerce, or the power of the states in the absence of regulation by Congress. It is enough to say in the present case that Congress has not acted, and there is not, therefore, that impediment to the law of the state; nor is there prohibition in the character of the burden. The effect of the provision is merely administrative, and so far as it affects interstate commerce, it does so indirectly."

**State Prohibition Laws and Interstate Business.**—Some of the



most interesting constitutional questions in this field have arisen from the liquor laws of the States when applied to shipments coming from other commonwealths. They have raised the problem—Where is the dividing line between national and State trade? Much depends upon the precise moment at which the large volume of goods flowing into a State ceases to be subject to the control of Congress and comes under the jurisdiction of the State government. An interesting example of this came up in 1890 in the case of *Leisy v. Hardin*, 135 U. S. 100; 1890. The State of Iowa having adopted a prohibition law which forbade the sale of intoxicating liquors, and Leisy having brought beer in sealed packages into the State, the beer was seized under the Iowa State law. Leisy, the owner, contended that the beer *was still a part of interstate commerce*, and as such it was subject, not to State law, but to the Federal control. He claimed that the State action in seizing the beer was unconstitutional, because the State had no right to prohibit interstate commerce. The Supreme Court upheld the owner in this contention and declared that so long as goods transported from one State to another were still in the "original package" or bundle, unsold, in which they had been shipped into the State, they remained a part of interstate commerce and as such were subject only to Federal, not State, regulation. This is known as "the original package decision" because it adopts as the dividing line between State and interstate commerce the package of shipment. When this package or bundle is sold or broken or part of its contents taken out, it ceases to be the "original" package and immediately becomes part of State commerce and therefore subject to State regulation. Until this takes place it remains in national commerce and cannot be prohibited by a State.

**The Wilson Act.**—Naturally this decision was regarded as a defeat for the prohibition States and they immediately pressed for a Federal law which would remedy the situation by conferring upon each commonwealth the authority to regulate, regardless of the original package. To this end Congress in the same year, 1890, passed the Wilson Act providing that intoxicating liquors shipped into any State for use there, "shall upon arrival in such State or Territory, be subjected to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, . . . and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

This law, passed in pursuance of the strong prohibition sentiment in the West, remained on the statute books for twenty-three years, during which time it was freely evaded with impunity. It raised some serious constitutional questions between the national and State governments, in deciding which, the Court established important new principles. The first problem was—can Congress in this way allow the States to regulate commerce in such a manner as to interfere with the free flow of national trade from State to State?

This question was presented in the case of *Rahrer*, 140 U. S. 545; 1891. Rahrer was a liquor dealer in Topeka, Kansas, prohibition territory, acting as agent for a Missouri firm. He received from Missouri and sold in the original package a pony keg of beer and a pint of whiskey. Upon being arrested under the State prohibition law, he appealed from the decision of the Kansas courts to the national Supreme Court, and claimed immunity from conviction and punishment. He admitted having received the liquor from another State and having sold it in Kansas in violation of the State prohibition law. He further admitted that under the Wilson Act this would be a punishable offence, since the liquor having been received by him, it had "arrived within the State" and was therefore subject to the State police regulation under the Wilson law. But, claimed Rahrer, the Wilson Act itself is unconstitutional, in that it permits a State to interfere with national commerce. Article I, Section I, of the Constitution declares that—"All legislative power herein granted shall be vested *in a Congress*." The undoubted meaning of this clause is that Congress, and Congress only, shall exercise the legislative power of the United States, subject to the President's veto. Any attempt by Congress to give or grant or delegate away to the States the legislative authority which the Constitution has conferred upon Congress itself, is therefore a violation of the Constitution, and is void. Does the Wilson Act commit this fault? In order to prove that it did Rahrer in his petition set forth that there were two kinds of interstate trade—first—local matters which the States in the absence of Congressional regulation might themselves provide for as we have already seen, but the second class was national not local in its nature, and could therefore be regulated only by Congress, and as the court had said in *Bowman v. Chicago Railway Company*, 121 U. S. 465; 1888, if Congress did not regulate this national type of trade, which necessarily required uniformity of treatment, then it must be understood that Congress wished this trade to be free from regulation and no State action was allowed. Pursuing this thought one step farther, Rahrer contended that under no circumstances could Congress give away to the States its control over this national class of trade which required uniformity, for in doing so, it would be delegating its legislative authority, and thereby violating the Constitution. The decision of the Supreme Court rendered by Chief Justice Fuller was that Congress could certainly not delegate its power but that the Wilson Act was not such a delegation of power.

"No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so." . . . "Congress did not use terms of permission to the State to act, but simply removed an impediment to

the enforcement of the State laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction." Accordingly the Wilson Act was constitutional and the conviction under the State law was upheld.

The next question under the Act was—when have intoxicating liquors "arrived within the State?" This problem was solved by the decision in *Rhodes v. Iowa*, 170 U. S. 412; 1898. The Iowa law prohibits the transportation within the State, of intoxicating liquors without a permit or certificate from the county auditor. Rhodes was a station-agent of a railway company, and he knowingly received and cared for a shipment of intoxicating liquors sent from outside the State to a consignee in Iowa. He had not yet delivered the goods but had taken them from the train and stored them in the warehouse on the station platform. He had, therefore, assisted in their transportation. At this point, and before delivery they were seized by a constable, and Rhodes was fined \$100 for violation of the State prohibition law. Upon appeal to the U. S. Supreme Court the question presented was whether under the Wilson Act the goods had "arrived within the State," and had therefore become subject to the State laws. The Court had already, in *Bowman v. Chicago Railway Company*, held that the Federal authority was exclusive so long as the goods were in course of shipment or in actual transit, that is, a State prohibition or police law could not take effect until the interstate shipment had been completed. The Federal Government could regulate them up to this point, but not the States. The Wilson Act, the court held, had simply made the State law apply one stage earlier, by divesting the commerce of its interstate nature when it "arrived." "Arrived" cannot mean at the State boundary for this would prohibit any transportation into the State. Yet the rest of the Wilson Act clearly shows that it was intended to apply to goods which were "transported into" a State. What was the purpose of the Wilson Act? Clearly not to authorize the States to stop interstate trains at their boundaries, but rather to remedy the *Leisy v. Hardin* decision of 1890. The emphasis, therefore, ruled the court, is to be placed upon the repeal of the "original package" part of that decision—shipments shall not be exempt from State laws by reason of having been introduced in original packages or otherwise,—showing that the goods were to be "introduced," not stopped at the boundary. As a result of this reasoning, the court concluded that "arrived" meant having reached the consignee, and that up to that point the goods had not "arrived," but were still in interstate commerce, were under the protection of the United States government, and were accordingly not subject to State regulation. The package having never been delivered to the consignee, but rather seized by the constable

before delivery, the goods in question had therefore not arrived within the State, and Rhodes could not be held for having violated the State law, since he handled the goods before their arrival and not after. This decision has been severely criticized in all the prohibition States, and it has been claimed that the Supreme Court should have taken the plain meaning of the Act and interpreted "arrived" to mean "reached the boundary," in order that each State might effectually prohibit the entrance into its territory of an article which it considered both obnoxious and dangerous. Undoubtedly the decision did open the way for a general violation of the State prohibitory laws. Notable instances of this are shown in the Kentucky Local Option Act of 1902, as interpreted by the Supreme Court in *Adams Express Company v. Kentucky*, 206 U. S. 129; 1907. The Kentucky law provided that shipments of intoxicating liquors to be paid for on delivery, commonly called C. O. D. shipments, into any local option county, city or town, should be deemed sales of such articles at the place where such money was paid, or the goods delivered. Such sales were forbidden. In spite of this Act a package of one gallon of whiskey was shipped from Cincinnati, Ohio, to East Bernstadt, Kentucky, to G. W. Meece. Meece had not ordered the whiskey, and testified that he was not expecting any, but was informed that it was at the company's office, consigned to him. He accordingly requested the company's agent to hold it until the following Saturday, when he would call and pay for it. This he did. The company was prosecuted under the Kentucky Act, but appealed to the Supreme Court. It was held that an express company was a common carrier; that it was its duty to accept any recognized article of commerce in one State and ship it to another; that the company could be, and in fact had been in the past, forced to accept such shipments, and that intoxicating liquors being heretofore a recognized article of commerce, the company had a legal right to engage in such shipment from State to State. As a part of this right it could also legally carry goods which had been paid for or for which the payment was to be made, upon delivery. It was a customary part of the express company's business to deliver C. O. D. in all parts of the United States, and the company in shipping liquors C. O. D. and collecting the price of the same in prohibition territory, was not "selling" goods in such territory. Finally, following the decision in Rhodes' case, the Court held that until Meece, the consignee, actually received the goods, the interstate shipment had not been completed, that is, the goods had not arrived within the State, and were therefore not yet subject to the State prohibition law. A similar decision was rendered in another prosecution of the Adams Company, in *Express Company v. Kentucky*, 214 U. S. 218; 1909, where the company's agent knowingly delivered intoxicating liquors to an inebriate and was exempted from prosecution under the State law on the ground that the liquors had been shipped from another State.

Meanwhile, the prohibition sentiment had been growing steadily stronger. The area of the United States subject to local option laws had become larger than that in which the sale of liquor was allowed, and the Democratic party having secured a majority in two successive elections, the decision to amend the Wilson Act swept all before it. In February, 1913, the Webb Bill was passed, providing that the interstate transportation of intoxicants into any State in violation of its police laws, is prohibited. The bill was vetoed by the President on the ground of unconstitutionality, both President Taft and Attorney-General Wickersham holding that Congress could not delegate to the States the power to banish interstate trade in intoxicating liquors; but both Houses immediately passed the bill over the President's veto. The intended effect of the Act is to allow the States to stop and seize any shipment of intoxicating liquors which crosses their boundaries in violation of their police laws. The reasoning in favor of the law which seems strong, is that Congress has always allowed the States to protect themselves against disease, contamination and other dangers, even though these dangers exist in interstate commerce. A State, for example, may establish a quarantine at its boundaries to prevent the entrance from other States of persons with a dangerous contagious disease. Congress may supplant these State quarantines whenever it wishes, but it has thus far allowed them to exist, despite their regulative effect on interstate commerce. How much more then can Congress allow the States to protect their people against the ravages of drunkenness even though, in so doing, they may prevent the entrance of intoxicating liquor, an article which in the judgment of their legislators is dangerous in the extreme. If the act is held to be constitutional however, it may open the way for a host of other laws submitting interstate trade to State interference—a result that must prove most harmful.

**State Regulation of Correspondence Schools.**—In the recent case of *International Text Book Company v. Pigg*, 217 U. S. 91; 1910, the Court attempted to set a limit to State regulation of national trade. The International Correspondence School through its text book company, employed agents in the various States to solicit scholars and to collect money due for courses and for text books. The Kansas agent of the company who maintained an office within the State at his own expense was required by the State to pay the usual license fee exacted from foreign corporations transacting business within the State, but he refused to do so. Later, Pigg, a student, having failed to pay his tuition fees, was sued by the agent of the company. He defended his non-payment of dues on the ground that the company's agent had failed to pay the legal license fee to the State, and was therefore transacting business in the State in violation of the law. On appeal to the United States Supreme Court, a decision was rendered against Pigg, in favor of the company, on the important ground that its business was interstate commerce.

This opinion marks a noteworthy step in the decisions in that it holds business intercourse by mail from State to State to be free from State licensing, inasmuch as it is interstate commerce. The Court ruled that the transfer of lessons and lesson papers, the imparting of knowledge, the return of corrected papers, and the interchange of communications necessary thereto all formed a species of intercourse between States which was in every sense a form of national commerce, and, as such, was not subject to interference by a State. Certain other regulations by the States have been approved, even where they affected interstate commerce, when they were of a local nature, such as health quarantine for both animals and persons to prevent the introduction of epidemic diseases from other States; local rules governing the lights to be displayed by vessels in a harbor,—The frigate *Gray v. the ship Fraser*, 21 Howard, 184; 1859. The construction of a dam across a small creek, even though that creek was sometimes entered by a sloop coming from another State,—*Wilson v. The Marsh Co.*, 2 Peters, 245, etc. This line of division between State and national regulation is further considered in the chapters on the Police Power and Constitutional Protections of Business.

**Federal versus State Regulation.**—The consideration of these decisions, which have been selected from various fields of regulation, seems to point toward the remedy for our present conflicting State rules, viz., a more extended uniform regulation by Congress over every part of the field of national trade which is now in danger of State control. So long as Congress abstains from setting up its own rules over national business the States will necessarily be forced by local public opinion to attempt regulation. And State regulation means conflict and confusion, with serious hindrance of interstate trade. This is doubly important in the case of carriers such as the railways, the express companies, and the telephone and telegraph companies, which are themselves the very means of transmitting commerce. In all of the decisions which we have considered, the Court where it permitted a State regulation to stand has expressly declared that it could be superseded at any moment by a national act on the subject. Contrary to the popular opinion on this question, we need not less legislation but more Federal laws with less State regulation of affairs which are in their nature national.

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#### QUESTIONS

1. What is the practical importance to business men of the dividing line between State and interstate trade?
2. Have the States any authority whatever over interstate commerce?

3. John Doe is given a monopoly of aerial navigation in the State of Illinois as a recognition of his services in perfecting the aeroplane. Richard Roe flies into the State from Indiana and is sued by John Doe under the rights granted in his monopoly. Decide the case with reasons. Cite an authority.

4. California makes rules governing pilotage in the harbor of San Francisco. The captain of a vessel entering from another State refuses to obey these rules on the ground that he is engaged in interstate commerce, and that until Congress acts, no State has authority to regulate the matter. Decide the case with reasons and cite a precedent.

5. Explain the general principle laid down in *Bowman v. Chicago R. R. Co.*, on the extent of State power over interstate trade.

6. Can a State bar out from its territory persons or animals afflicted with a dangerous contagious disease?

7. Can it forbid the use of stoves which it considers dangerous, on all trains within the State, and apply this prohibition to trains coming in from another Commonwealth? Reasons.

8. A State requires all persons acting as locomotive engineers on any trains in the State to pass a test for color blindness for which test a fee of \$5 is charged. Will this Act apply to locomotive drivers on interstate trains coming into the State? Reasons.

9. Massachusetts attempts to forbid the sale of oleomargarine prepared in imitation of butter. Can the oleo manufacturers of other States sell their goods in Massachusetts in violation of the Act? Reasons.

10. Can a State regulate interstate railway trains for the convenience of a citizen?

11. Ohio requires all railways in the State to furnish a given number of trains daily to all towns on their routes with a population of 3,000 or over. Will such a regulation apply to an interstate line running through Ohio?

12. Would the law be valid if it provided that all trains on all lines must be stopped at all county seats on the line? Reasons.

13. The railroad commission of a State orders the stopping of a through express on an interstate railway at a small town of one thousand inhabitants. The railway claims that this will interfere with the speed of its service and drive patrons to another competing line, also that the town in question has abundant railway facilities. Decide the constitutional question at issue with reasons and cite an authority.

14. What is an "original package" of interstate commerce?

15. What was the importance of this package in the *Leisy Hardin* decision?

16. What were the chief provisions of the Wilson Act and why was it passed?

17. How was it possible to evade the State prohibition laws under the Wilson Act?

18. Explain the court interpretation which made these evasions possible.

19. What is the chief provision of the Webb Act and how does it affect such evasions?

20. What was Attorney General Wickersham's view of its constitutionality in 1913?

21. Frame an argument in favor of its constitutionality.

22. In violation of the State law, an Express Company delivers liquor sent from Boston in C. O. D. shipment, to John Doe of Portland, which he had not ordered. The company is convicted, and appeals to the U. S. Supreme Court. What would be decided under the Webb Act?

23. Can the Kansas agent of a correspondence school situated in another State be compelled to take out a local license and pay a fee for the privilege of transacting business in Kansas? Reasons.

24. What are your impressions as to the effect of State regulations of interstate business?

## CHAPTER XI

### POWERS OF CONGRESS—Continued

#### THE POSTAL POWER

**The Work of the Post Office Department.**—Of all the government departments, that which touches the people most closely is undoubtedly the post office. Its branches reach out to every hamlet of the land, its employees number 286,000, its receipts total \$266,000,000 yearly, its expenditures \$265,000,000. This entire establishment with all its important activity is based upon one short clause in Section 8, Article I of the Constitution which gives to Congress the power "to establish post offices and post roads." The term "to establish" is a very broad one. It includes the designation as postal routes of certain roads, railways and shipping lines, the power to make contracts with the railways, steamships, and other carriers for the transport of the mails, and without doubt it would also give a constitutional authority for the erection or purchase of telegraph and telephone lines if such were considered necessary, just as the government now builds and controls post offices, pneumatic postal tubes, etc.

The post office is not merely a means of carrying letters. On the contrary it is a gigantic machine whose energies may be turned in such a direction as to serve materially the business progress of the country. From this larger viewpoint let us regard some of the chief problems which the Department is now successfully solving.

**1. Postal Savings Bank.**—All the principal countries of the world have adopted a plan by which every post office becomes a savings bank. The result has been to stimulate wonderfully the habits of thrift and economy among the people and to render their funds useful for important government undertakings. After much opposition Congress on June 25, 1910, passed a law providing a postal savings plan. The system is under the general control of a Board of Trustees consisting of the Postmaster-General the Secretary of the Treasury and the Attorney General. This Board designates which post offices may act as savings depositories, and at such places any person ten years of age or over may open one account to a maximum amount of \$500. Deposits may be made in amounts varying from \$1 to \$100, and in order to encourage the saving of smaller amounts it is provided that savings cards with adhesive stamps known as postal savings stamps may be purchased at the post office, each card and each stamp representing ten cents. When the stamps amount to \$1 they may be deposited



with the card and are then destroyed by the postmaster and credited in the account of the depositor. The funds of the system are deposited in local banks and draw from such banks  $2\frac{1}{4}$  per cent interest. Thirty per cent of such funds may be invested in bonds or other securities of the United States. The depositor is paid 2 per cent interest and the government guarantees the payment of the deposits. Against strong opposition from the banks this system has been extended into all parts of the country. At the end of the first year of business, December, 1911, the division had 162,000 depositors and \$10,600,000 deposits. At the end of two and one-half years in June, 1913, there were 331,000 depositors with \$33,800,000. The officers of the Postal Savings Division have taken steps to popularize the plan and its facilities still further, by calling it to the attention of the public through the local postmasters.

**The Parcel Post.**—For many years there has existed a strong demand for a postal express service similar to that of other nations, by which packages of moderate size may be sent through the mails. Such a plan found little support in Congress because of the strong opposition of the express companies and the small country storekeepers, the latter fearing that their business would be hampered or destroyed by the mail-order stores in the large cities. The leading express companies had made a remarkable profit on the small package business and their rates were abnormally high, so that the natural current of small trade between different parts of the country was clogged or entirely stopped by the expense of transmission. In a law suit over a question of taxation it was testified by the agents of the four largest companies that their annual earnings in one State, Ohio, equalled many times the property which they owned in that State. The company with the smallest earnings had a property investment of \$42,000 on which it earned \$280,000 in one year. This highly artificial condition was maintained for many decades after other nations had established cheap and efficient postal express service. At last, in the political changes of the years 1910 and 1912 the influences which blocked the new system were finally weakened and on August 24, 1912, Congress passed an act providing for a modern Parcel Post. This law went into effect on January 1, 1913, and has wrought a revolution in the conditions of interstate retail trade. The country is divided into zones based on distance from the point of sending, and the charges vary according to these distance zones. The article sent may be insured up to \$50 on payment of a small fee. The results of the first year of the service were so satisfactory, even at the low rates charged, that a reduction in rates and an increase of the size of the package which might be carried was made; the weight limit is now 50 lbs. for the first and second zones and 20 lbs. for the others, and books have been added to the parcels accepted. The Third Assistant Postmaster General whose jurisdic-

tion includes the parcel service in his report for 1913, says of the growth in business:—

“The usefulness of the parcel post as a ready, cheap, and efficient means of transportation is realized by the public more and more each day. Its numerous features and advantages are being utilized in a surprisingly large number of ways, and there is almost no limit to the variety of articles transported. The consumer is placed in direct touch with the farmer and producer whose products can now be conveniently and quickly obtained at a very reasonable charge for transportation and handling, thereby assuring the freshest fruits, vegetables, eggs, butter, and other necessities, for the lowest possible price and opening the way to the lowering of the high cost of living, which has caused so much concern in recent years. As a saver of time to those who in the past were compelled to leave their accustomed duties in order to get articles which now are brought to their doors by parcel post, the system has proven a boon indeed. The fact that the service is universal, extending to every city, town and village of the United States and its possessions, and covering a field vastly greater than that of any other transportation agency, at once makes it the ideal system for carrying on the small commerce of the Nation. The usefulness of the system was greatly enlarged by the addition, on July 1, 1913, of a collect-on-delivery service, and it is now possible for one to send an article by parcel post for repairs and then have it returned, insured against loss, the charges for the repairs to be paid upon delivery of the article. Furthermore, by utilizing the special-delivery feature of the postal service the forwarding and return of the article can be expedited to the fullest extent. The advantages and accomplishments of the parcel post have not only been direct, but indirect as well, for the competition created by it has caused other transportation agencies to increase their limits of free delivery in many districts, improve their service in other respects, and decrease their charges in many instances.”

**Marketing by Mail.**—In 1914 the first steps were taken in a plan to bring the farmer and the consumer into direct relations through the Department. A list of farmers was prepared by local, rural postmasters, giving the kind of produce and the quantity which each would supply at regular intervals. These lists were furnished to the large city postmasters who in turn distributed them to the prospective customers in the city, upon application. The farmer and his customer having made satisfactory arrangements, the produce was then forwarded by parcel post. The possibilities of this system seem most promising and it has already been extended to several large cities.

**Fraud Orders.**—The Postmaster General has authority to exclude from the mails all fraudulent, illegal or obscene matter. This important power has given rise to the celebrated “Fraud Order” which is an administrative decree issued against those

firms who are proven to be engaged in a fraudulent business. It excludes their circulars, letters, etc., from the mails. The power is a drastic one and is frequently resisted by impostors and others who are detected in attempts to defraud the public by advertising methods. In *Degge v. Hitchcock*, 233 U. S. 639; 1913, Degge and the Wellington Development Company had been shown by evidence adduced before the Postmaster General to be engaged in a fraudulent land scheme. Notice was given to Degge and to the company and a formal hearing was held. The charges were found to be true, and an order was issued directing the Postmaster at Boulder, Colorado, not to deliver to Degge or to his corporation the mail addressed to them, but to return all such letters to the sender with the word—"fraudulent" plainly stamped on the envelope. Degge and his corporation thereupon filed a suit in the Federal court asking that a complete record be certified to the court by the Postmaster in order that a judicial decision should be made on the order—to this end he applied for writ of certiorari. This was denied by the Supreme Court on several grounds, the strongest being, that the Courts will always refuse to interfere with the action of administrative officials, unless some clearly illegal or inequitable official performance is shown. In such case the proper remedy is by a writ of injunction or mandamus.

As Degge was unable to show any illegality on the part of the officers, and as the writ of certiorari is never otherwise issued to government officials to interfere with their official duties, the action of the Postmaster General was upheld.

**Administrative Organization.**—The organization and work of the department deserve special notice. Thus far we have paid little attention to the administrative framework of the departments, since in most respects they are similar and present few features of interest. In view of the intimate relation of the Post Office with the people, the magnitude of its operations, and the care with which its administrative machinery has been worked out, we shall examine this structure in some detail, taking it as an example of departmental methods. The Postmaster-General, who presides over the Department, has four assistants, each controlling certain definite groups of bureaus, divisions and offices. All grades of work, even the most important, are conducted by the chiefs of these bureaus and offices and are then if necessary referred for approval to that Assistant Postmaster-General who exercises jurisdiction over the bureau. That official then approves or disapproves, usually by initialling the papers presented, and passes on the most important affairs prepared, for approval by the Postmaster-General. The latter is naturally obliged in most cases to rely upon the recommendations of his assistants. The following outline gives some notion of the method of organizing the work of the Department.

*First Assistant Postmaster-General.*

*Division of Salary and Allowances.*

Division of Post Office Supplies.

Division of Money Orders.

Division of Dead Letter Office.

Division of Correspondence.

Of these the most important is the Division of Salary and Allowances, which has charge of the annual readjustment of postmasters' salaries, allowances for clerk hire, rent, fuel, light, advertising, etc. The head of this Division recommends action in each case and while his recommendation may be modified or may not be accepted by the First Assistant, yet in practice it is usually adopted. The importance of this power may be understood when it is known that the expenditures of the Division in 1913 exceeded \$79,000,000. There is always some danger of abuse of this power, as was illustrated by an investigation made some years ago, in which a regular system of selling salary increases was discovered. According to the report of the Fourth Assistant Postmaster-General who directed the investigation, the clerks and other employes who desired increases of salary often paid in advance of these increases. Such payments could not be made openly with safety, so the employes in question purchased "stock" in various companies officered or owned by their superiors, a large part of the proceeds presumably going to the officials who recommended the increase in pay. In the thorough house-cleaning which followed this exposure the Division was reorganized and has now become an efficient means of controlling, systematizing and keeping down useless expenditures.

*The Second Assistant Postmaster-General.*

Railway Adjustment.

Contracts.

Inspection.

Mail Equipment.

Railway Mail Service.

Foreign Mails.

These all have to do with the transportation of the mails. Of them all the most interesting is probably the railway mail service. This Division has charge of the travelling post offices all over the United States, whether in trolley cars, railway cars or steamboats. The sorting of mail while in transit is done by the most highly trained and efficient clerks in the national service; the large through trains on the railway systems of the country often carry a double force of clerks who work in shifts, under high pressure, opening the sacks as the latter are thrown into the cars, sorting the mail and distributing it among a large number of bags ranged along the walls of the cars, and completing each lot by the time the various destinations along the route are reached. In order to do this each clerk must usually be familiar with the names of 1,200 to 20,000 post offices and their locations, together with the respective routes to which they belong. In the foreign mails carried on the ocean steamships there are also travelling post offices with a double force

of clerks, American and foreign. The Division of Railway Adjustment has charge of the arrangements for the railway transportation of mails—expending over \$35,000,000 annually for this purpose. The national territory is divided into districts and in each district contracts are made with the railways for the transportation required. These contracts are based on the weight of the mails which is determined once every four years in each district. The powers of the other divisions are sufficiently explained by their names.

*The Third Assistant Postmaster-General* has charge of the general finances of the Department, including:

- Post Office Treasuries.
- Stamp Supplies.
- Postmasters' Accounts.
- Classification.
- Registry.
- Redemption.
- Files and Records.
- Postal Card Agent.
- Stamped Envelope Agent.
- Stamp Agent.

*The Fourth Assistant Postmaster-General* directs matters relating to the personnel of the service and to the free delivery of mails; these are grouped as follows:

- Division of Appointments.
- Division of Bonds and Commissions.
- Division of Inspectors and Mail Depredations.

Free Delivery Division, including city, rural and special delivery branches.

The first three divisions are the most important, having charge of the personnel and the maintenance of its efficiency and honesty. In the Division of Appointments all papers referring to the appointment of the 74,000 postmasters in the United States are briefed and filed for the consideration of the Fourth Assistant, the Postmaster-General and the President. The establishment and discontinuance of post offices and the complaints against postmasters are also referred to this Division.

The Division of Inspectors and Mail Depredations maintains a highly skilled corps of inspectors distributed through fifteen inspection districts which cover the United States and its dependencies. Their duties are to examine on the spot the accounts of postmasters, investigate all complaints, accidents to the mails, robbery and other interference with the business of the Department. In the course of this work they are obliged to vary their activities through a wide range of occupations from accountant to detective. It is largely through the efforts of this Division that all the more important irregularities in recent years were unearthed. These irregularities show not only the need of a larger force of inspectors,

but also the necessity of a more thorough and careful utilization of their reports.

The Division of Free Delivery is under the direction of a General Superintendent, who retains immediate control of the subject of special delivery, but delegates to two subordinate superintendents the branches of city delivery and rural delivery respectively. The city free delivery service was established on July 1, 1863, in 66 cities with 685 carriers. It has now been extended to 1,032 cities with 20,000 carriers. The rural free delivery system which was established on 44 routes in 1897 and has since grown to include 2,200 routes, marks the greatest advance of our postal system since the Civil War. It has been opposed in some sections because it tends to reduce the number of fourth-class post offices and thereby also the number of political appointments open to party workers, but to the masses of the farming population it has proved a great boon and the demand for the establishment of new routes far exceeds the available appropriations.

**Newer Problems.—1. The Magazine Rates.**—All magazines and periodical publications are carried in the mails as second-class matter on which the charge is one cent per pound. The government pays the railways much more than this to carry such matter. One-half or more of the weight of a magazine, and all the profit, are in the advertising pages. It is the advertising which causes the unusual cost of carriage. This expense has been sharply criticized by many who contend that the post office should pay its own way and should be run as a business enterprise. But by means of this second-class rate the low-priced magazines representing many million copies weekly and monthly have been enabled to reach out through the country until the people are provided in this way with a cheap weekly review of current events, fiction, popular science, etc. It has been calculated that although we buy fewer books proportionately than any civilized people except Russia, we read many times more magazines than any other nation. So small is the margin of profit on each copy of these magazines than an increase of a cent or two per pound in the postage rates would put most of them out of business. Such a charge would be a serious loss to the public and would be a step backward in our national progress. An increase in the rate has been resisted thus far, but a compromise by which the advertising pages will pay more, seems probable.

**2. One-Cent Letter Postage.**—An influential section of the business world is now discussing the possibility of a one-cent rate for letters. The contention is that if the magazines were charged the higher rate which in justice they should pay, there would be such a large surplus in the postal department as to allow of a reduction to one cent in the rate on letters. This would be a great boon to the business community. It is claimed that the two-cent letter rate now yields an actual surplus which is eaten up by the deficit on magazine postage. The magazine publishers however

contend that their advertising pages originate a large number of inquiries and correspondence at the letter rate and that no real economy would be effected by the change in rates.

3. **The Post Telegraph.**—A government ownership and operation of the telegraph has been frequently proposed with a view to cheapening the cost to the public. Strong arguments are adduced on each side, the chief grounds in favor being lower rates and the success of foreign governments in this field; while against the plan, the alleged lower efficiency and slowness of transmission in foreign systems are urged together with the general danger of Socialism. A committee appointed by the Postmaster to investigate the subject, reported in 1913 in favor of government management of both telegraph and telephone and urged that the post offices be used for this purpose in order to effect economies in management.

**Bankruptcy.**—The protection of business men against fraudulent bankrupts and debtors is one of the difficult problems confronting the National Government. Section 8, Article I, gives Congress the power to pass "Uniform Laws on the subject of Bankruptcies throughout the United States." Trade between the States has grown to such a point that it is difficult, if not impossible, for the creditors of a firm doing business in several commonwealths to protect their interests under all the varying State laws. For this reason the power to establish a uniform law was wisely given to Congress. For many years this power was not exercised, and as some regulation was necessary the States themselves passed bankruptcy acts. In 1867, a Federal law was enacted by Congress which superseded the State rules. But in 1878, the Federal law was repealed and the former State laws once more became valid. Finally in 1898, in response to the general demand of business interests, Congress again passed a law regulating bankruptcy, which was amended in 1901, 1903 and 1910, and the State laws were once more superseded by a uniform national rule.

These changes in the law are interesting, not only as they affect bankruptcy, but as they show the supremacy of and the need for national legislation on those subjects which are given to the control of Congress. They illustrate the rule that where the Constitution has granted to Congress a power which, however, Congress does not see fit to exercise, the State governments may generally issue regulative acts of their own on the subject; these acts are valid and binding until Congress exerts its power to regulate, when the State laws are superseded by the Federal Act. Should Congress at any time repeal its laws, the State regulations again become valid.

**The United States Bankruptcy Act**, as amended in 1910 provides that the Federal District and Territorial courts of the United States shall have jurisdiction over bankruptcy. Upon a petition being filed by creditors in a Federal court asking that a debtor be declared bankrupt, the court summons the defendant, and invites his creditors to prove their claims under the usual legal forms;

a jury trial may be granted if the court so decides. An application or petition for involuntary bankruptcy is granted against a debtor when he commits any of the following acts of bankruptcy:—if he conveys, transfers, removes any part of his property with intent to hinder, delay or defraud his creditors;

Transfers while insolvent any portion of his property to certain creditors with the intent to grant them a preference over other creditors;

Allows, while insolvent, any creditor to secure preference by legal proceedings;

Makes a general assignment for the benefit of his creditors or applies for a receiver or trustee in insolvency, or where such a receiver or trustee has been appointed under the law;

Admits in writing his inability to pay his debts and his willingness to be adjudged a bankrupt; a person or corporation may also be adjudged an involuntary bankrupt upon default of payment after an impartial trial. After the court has considered the application of the creditors and the debtor's rejoinder, it either rejects the application and allows the debtor to continue, as before, in control of his own affairs, or it finds him to be bankrupt and appoints a referee and a trustee to manage his property. The work of the referee is to find and recommend to the court a solution of the whole problem so as to incur as little loss as possible for both sides. He takes charge of the proceedings, receives the claims, makes up a list of the assets, and in general administers the estate of the bankrupt. The trustee receives the property under the direction of the referee and of the Court, collects and reduces to money the assets of the estate and disburses them, making a final account or report, and pays the dividends as declared by the referee. Both referee and trustee are paid partly in a fixed sum and partly in a percentage of the bankrupt's estate. The Court calls meetings of the creditors when necessary for the presentation and proof of their claims and for the approval of any compromise or composition which may be offered.

The Act also fixes an order of priority of claims against the estate and provides that any bankrupt who conceals his assets or makes a fraudulent statement concerning them may be punished. After the proceedings have been closed a motion may be made for the discharge of the bankrupt. If the Court decides favorably on this motion, the bankrupt may then be legally freed from further responsibility for his debts, except:—taxes, claims for property which he has secured by false pretences, debts for willful or malicious injuries or alimony for the support of his wife or child or other criminal penalties, those debts which have not been duly listed in time for proof during the proceedings of bankruptcy, unless the creditor had notice of the proceedings, and finally those debts which were created by fraud, embezzlement or defalcation while acting in a position of trust.



These provisions of the law have had a strong, helpful influence in the protection of both creditors and debtors, but further government supervision is needed to shield the creditor from certain notorious abuses. It has become customary for fraudulent debtors to set up as wholesale or retail merchants, usually in the form of a partnership or trading company, to pay promptly for their goods until they have established a commercial rating, and then suddenly to buy large consignments on credit from many different firms, to ship their goods from their stores to distant points where they are sold at auction, while the firm suddenly declares itself insolvent and either "loses" its books or burns them. The members profess complete ignorance of the causes of their failure, and are usually found to have no personal assets when bankruptcy proceedings commence. Hitherto this practice has been combatted by the National Association of Credit Men, but most creditors prefer not to "throw good money after bad," and will often refuse to prosecute or to pay the expense of a thorough investigation unless the loss is a heavy one and the proof of fraud is clear. As long as the initiative and the cost of detecting fraudulent debtors and restoring stolen property depends entirely upon the private creditor, there must always be a standing invitation to dishonesty in such a system. The only remedy is a complete control of fraudulent bankruptcies by the Federal Government, and a sufficiently large national appropriation to cover the detection of such crimes and the recovery of the sums involved. Such a plan would effectively discourage the systematic bankruptcy frauds now practiced, and would offer to all creditors a much-needed protection.

One of the difficulties yet to be overcome is in the administration of the bankruptcy act. The law itself is excellent in purpose and scope but it has been hampered by the appointment of incapable referees. In the event of a fraudulent bankruptcy, all the chances of escape favor the bankrupt; he may plan for months, or in some cases years ahead, to defeat the law and in such cases it is difficult if not impossible to detect the well-laid plans for concealment of assets or their transfer to other members of the conspiracy.<sup>1</sup> The

<sup>1</sup> The following is a typical case reported in the Bulletin of National Association of Credit Men, November, 1913. Sam L— and Sarah L—, his wife, operate separate stores in a western city. Sarah L— fails with total liabilities of \$35,000 widely distributed among various creditors in the northwest. One of the creditors, with a claim of \$700 suspects fraud and communicates with the others, asking that an investigation be made and that the consent of the creditors be not given to any discharge or settlement until the claims of all are satisfied in full. The other creditors answer that undoubtedly the case is fraudulent but that there is no proof whatever obtainable and that it would be useless to spend further funds; they advise that a settlement of 25c on the dollar be accepted. This the \$700 creditor refuses. He employs an attorney of ability who puts detectives on the case and the following facts are soon discovered:

Sarah L— has been conducting a series of cut-price sales in many instances at figures below what the goods could be purchased for; shortly before her failure she sends a large part of her stock to her husband's store, where it is packed in

remedy for this condition of affairs is a greater care in the selection and appointment of referees in bankruptcy by the Federal judges. Requests to this effect have been made by the Credit Men's Association, to the members of the District Courts throughout the country. There is also need for a larger staff of postal inspectors to make possible an immediate and thorough investigation of this elusive and demoralizing practice. A closer co-operation between government agents and the credit men of the country would also do much to bring the whole problem to a solution.

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## QUESTIONS—THE POSTAL POWER

1. Cite and explain the constitutional clause governing the postal power, and show by illustration the meaning of "establish" as used in this clause.
2. Explain the general work of the Post Office, and give some idea of its magnitude and its particular relations to the people.
3. Resolved that the Post Office should confine itself to the transmission of letters. Defend either side of this question, showing the advantages and disadvantages of other activities.
4. A foreigner asks you how the postal savings bank is managed, and its general regulations. Explain.
5. Why was the Parcel Post opposed, and why adopted? What is its present usefulness?
6. Resolved that the Post Office can assist in reducing the cost of marketing. Defend either side of this question.
7. What is a fraud order?
8. A company engaged in a fraudulent business finds that the circulars which it sends out are being returned to it marked "fraudulent." It protests on the grounds that the circulars are its own property which it has a right to send through the mails, or to dispose of as it pleases, under the 5th Amendment. Cite the 5th Amendment, and explain what the Court would decide as to the rights of the company and why.
9. An immoral or fraudulent publication or letter is offered for transmission through the mail. Explain fully the exact authority of the postal officials over this matter.
10. Prepare a report showing the general administrative organization of the Post Office Department, and contrast its organization with that of your county government. Which is the more effective form of organization and why?

trunks and sent northward to a point above Seattle. Here it is stored in a warehouse for several months and later re-packed in large shipping cases and sent back to her husband's store where it is placed on sale. A portion is also sent to the stores of her brothers-in-law and there sold. Indictments are found against Sarah L— and her husband and brothers-in-law, charging her with perjury and all with conspiracy to conceal her assets and defraud the creditors. The men are convicted and Sarah L— is yet to be re-tried on the perjury charge.

11. Resolved some increase should be made in the rates charged for transporting magazines through the mails. Defend either side of the question.

12. Resolved that it is constitutional for the Post Office to practice and operate the large interstate telephone and telegraph lines of the country. Defend either side of the question.

13. Resolved that it is advisable for the Government to purchase and operate the interstate telephone systems of the United States. Support either side of this question.

#### QUESTIONS—BANKRUPTCY

1. What is the exact authority of Congress over Bankruptcy? If Congress did not pass a bankruptcy law could each State do so?

2. Resolved that Congress should leave the regulation of bankruptcy to state legislation. Defend the negative.

3. Why is a bankruptcy law necessary?

4. Explain the difference between voluntary and involuntary bankruptcy under the Federal law.

5. How may an insolvent firm become a voluntary bankrupt under the Federal Act?

6. You have a claim against John Doe & Company, and you receive information that he is transferring his assets to his wife. What steps can you take? Explain fully.

7. Explain and illustrate why the bankruptcy law is so easily evaded.

8. Resolved that it is better financial policy for the creditor not to push a criminal prosecution of a fraudulent debtor. Defend either side of this question.

9. Explain the practical value and work of such bodies as the National Credit Men's Association, in the enforcement of the Bankruptcy Act.

10. Point out some of the weaknesses in the administration of the Act, and show how they could be remedied.

## CHAPTER XII

### THE POWERS OF CONGRESS—Continued

#### THE WAR POWER

**Legal Basis of the Power.**—Although the war power of Congress now seldom occupies the minds of Americans, it was at first regarded as deserving of the greatest attention; more space is devoted to it in Section 8 of Article I than to any other authority. Seven clauses are required to convey the grant:—

*Congress shall have power to*

Declare war,

Raise and support armies,

Provide and maintain a navy,

Make rules for the government of the land and naval forces,

Provide for calling forth the militia,

Provide for organizing, arming and disciplining the militia,

Exercise exclusive legislation over forts, magazines, arsenals and dockyards.

**Declarations of War.**—As we contemplate the vast extent of the authority conferred on Congress by these clauses, a number of questions arise, which can best be answered by a brief review of precedents. How is war declared? The usual method is a simple resolution passed by both Houses and signed by the President, declaring that a state of war exists between the United States and the nation in question. A declaration of war between modern nations usually allows three days in which merchant vessels of the enemy must leave the ports of the country making the declaration, otherwise such vessels are liable to capture. Contrary to prevalent belief, the declaration of war may be and often is made after the war itself has begun. This occurred in the Japanese-Russian War of 1904, when the naval hostilities opened, by surprise, on the night of February eighth, while the declaration followed on the tenth of that month. The purpose of Japan in delaying the declaration was to strike while the Russian naval force was divided into two detached squadrons.<sup>1</sup>

<sup>1</sup> *Declaration of War by Japan.*—The following declaration was made on February 10, 1904. "We, by the Grace of Heaven, the Emperor of Japan, seated on the Throne occupied by the dynasty from time immemorial, do hereby make proclamation to all our loyal and brave subjects as follows:

"We hereby declare war against Russia and we command our army and navy to carry on hostilities against her in obedience to duty and with all their strength, and we also command our competent authorities to make every effort in pursuance of their duties and in accordance with all the means within the limits of the

## THE NEW AMERICAN GOVERNMENT

ns in the European War.—How important the delay war may be, is well shown by the great European con- the outbreak of hostilities between Austria and Serbia, be known that she would not tolerate an Austrian of Serbian territory, and she began to mobilize part of to support this position. Then began a remarkable mpts by the Great Powers to open the war without ations, each seeking to show that the other had taken . Both the Triple Alliance of Germany, Austria, e Triple Entente of England, France and Russia, were ensive. The leaders in each of these two leagues felt ressive, offensive act on their part would give the other he league an opportunity to refrain from joining in the quently each Power sought to take up a defensive hat when attacked it might call upon its allies. This curious reluctance to make a formal declaration of ny in particular was placed in a position where she between a defensive attitude in the hope of winning ort and English neutrality if war broke out, or the un- advantages of a quick and surprising offensive in pursuance epared and carefully worked out plan of attack. She ater and lost the former. On August 1st she sent a ultimatum to Russia to stop mobilizing and that d war on Russia and invaded Luxemburg *on the French* is was an act of war on France, but the French scrui- ained from making any formal declaration in return.

moral sense of the people of the United States, have been a disgrace to Christian civilization, culminating, as they have, in the destruction of a United States battleship, with 265 of its crew and officers, while on a friendly visit in the harbor of Havana, and cannot longer be endured, as has been set forth by the President of the United States in his message to Congress of April 11, 1898, upon which the action of Congress was invited: Therefore, Resolved by the Senate and the House of Representatives of the United States of America, in Congress assembled, First, That the people of the Island of Cuba are and of right ought to be free and independent. Second, That it is the duty of the United States to demand, and the government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government in the Island of Cuba, and withdraw its land and naval forces from Cuba and Cuban waters. Third, That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect. Fourth, That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said Island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the Island to the people."

This demand amounted to an ultimatum and the Spanish Court never received it, but immediately upon the passage of the resolution by Congress broke off diplomatic communication with the United States and recalled the Spanish minister. The hostilities therefore began on the following day, April 21st, although no formal declaration of war had been made at that time. The declaration itself was passed by Congress on April 25th and is to be found in the Public Laws of the United States of America, passed at the second session of the fifty-fifth Congress, 1897-1898, Chapter 189. "An act declaring that war exists between the U. S. of America and the Kingdom of Spain. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, First.—That war be, and the same is hereby declared to exist, and that war has existed since the 21st day of April, 1898, including said day, between the United States of America and the Kingdom of Spain.

"Second. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into actual service of the United States the militia of the several states, to such extent as may be necessary to carry this Act into effect."

The last step in the declaration of war is its public proclamation by the President and the notification to foreign powers by our diplomatic representatives abroad. This proclamation is usually a

Article 1). The original fear of a military dictatorship; if the funds are appropriated only for short periods, the army cannot become independent of the government, and it is difficult for any military leader to establish his authority in defiance of this provision is taken from the British Act of 1801 which applied to the navy appropriations in a similar way. That it apply to the navy appropriations because they are appropriated from that quarter. The army and navy have rapidly grown until they now reach astonishing figures.

*In 1914 they were as follows:*

Military, \$125,000,000;

Naval, \$139,000,000.

The entire expenses of the government, exclusive of interest on the public debt and postal service were \$680,000,000 in 1914. In time of peace over one-third of the total expenditures of the national government is due to our military commitments. The cost of pensions is not included in the above figures. They amount to \$170,000,000 annually.

Like all other large appropriations the army bill is usually attached to it,—provisions which are really separate bills in order to increase their chances of passage are moved to the army measure. In this way important military and national policy are often determined by the army appropriation. So in the bill of 1903 the reorganization of the army was reorganized, in the bill of 1901 the army was given absolute sway over the government of the Philippines. The so-called "Platt Amendment" in 1901 provided that American military forces should not be withdrawn from Cuba until the Cuban Constitutional Convention had met.

**Army Administration.**—In all genuinely representative governments the problem of successful military administration has remained unsolved. It differs from the management of civil affairs in that the test of efficiency comes only in times of great crisis.

tion which, either as a part thereof or in an ordinance appended thereto, shall define the future relations of the United States with Cuba, substantially as follows:

## I

That the government of Cuba shall never enter into any treaty or other compact with any foreign power or powers which will impair or tend to impair the independence of Cuba, nor in any manner authorize or permit any foreign power or powers to obtain by colonization or for military or naval purposes or otherwise, lodgment in or control over any portion of said island.

## II

That said government shall not assume or contract any public debt, to pay the interest upon which, and to make reasonable sinking fund provision for the ultimate discharge of which, the ordinary revenues of the island, after defraying the current expenses of government shall be inadequate.

## III

That the government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property and individual liberty, and for discharging the obligations with respect to Cuba imposed by the treaty of Paris on the United States, now to be assumed and undertaken by the government of Cuba.

## IV

That all Acts of the United States in Cuba during its military occupancy thereof are ratified and validated, and all lawful rights acquired thereunder shall be maintained and protected.

## V

That the government of Cuba will execute, and as far as necessary extend, the plans already devised or other plans to be mutually agreed upon, for the sanitation of the cities of the island, to the end that a recurrence of epidemic and infectious diseases may be prevented, thereby assuring protection to the people and commerce of Cuba, as well as to the commerce of the southern ports of the United States and the people residing therein.

## VI

That the Isles of Pines shall be omitted from the proposed constitutional boundaries of Cuba, the title thereto being left to future adjustment by treaty.

## VII

That to enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense, the government of Cuba will sell or lease to the United States lands necessary for coaling or naval stations at certain specified points, to be agreed upon with the President of the United States.

## VIII

That by way of further assurance the government of Cuba will embody the foregoing provisions in a permanent treaty with the United States.



... broke down so completely that the most  
disease and mortality among the troops and a  
parts of the military commanders resulted. The c  
uation were aggravated by the appointment, t  
fluence, of large numbers of inexperienced men f  
sitions in the various supply bureaus of the vo  
rnful as this influence was in weakening the army  
re the frauds perpetrated on the government by  
d supplies, the fundamental weakness of the wh  
the lack of "team-work" between the quarterm  
ving charge of the accommodations for troops, the  
istence, having food and supplies in charge, th  
reau, the medical corps and the commissary of t  
ving control of the movement and transport of t  
reaus which enjoyed a like independent organizati  
the Signal Service, Ordnance, Adjutant Genera  
ays and loss of life in the war showed the disastrou  
such a group of independent bureaus and proved th  
purpose necessary to provision the army and mai  
te of comfort and efficiency, was lacking.

Popular indignation wreaked itself upon the Secret  
: not all the inefficiency was justly chargeable to the  
t time. In March, 1902, the new Secretary, Mr. R  
ore the Senate Committee on Military Affairs sa  
eve that with the organization as it was at the out  
with Spain and is now, the outbreak of any war wo  
ruin any man who was Secretary of War. I think  
is such that it is impossible that successful res  
uced until they have been worked out<sup>1</sup>

had been drawn up and it will be seen that the confusion, mismanagement and loss of life which occurred *on American soil* even before our troops reached Cuba arose principally from the lack of unity and system.

**The General Staff.**—To remedy the condition just described the War Department prepared two important measures which have since become law: First, the consolidation of the Quartermaster's, Commissary's and Paymaster's bureaus into a Bureau of Supply with a staff officer at its head, and Second, the establishment of a General Staff with a responsible chief. The consolidation of the supply bureaus is aimed to secure system and order in providing the vital necessities for the army's existence and activity; the establishment of a General Staff is intended for the same purpose and also to work out in advance suitable plans of campaign for the guidance of the commanding generals in the field. These changes are in substance taken from European practice and from our own experience. The armies of France, Germany, Japan and Russia are presided over by carefully organized central authorities, the head of which is in each case an experienced general officer. Obviously the need of efficient management is the same in all wars. Even to the layman it is evident that in all things pertaining to the discipline and control of troops there must be unity of purpose; what the layman does not see, but what is equally true is that the same principle must be followed in devising plans of campaign or in supplying food, transportation, and equipment.

Napoleon's famous maxim that "an army travels on its stomach" points to a vital problem of military management. We are accustomed to think that the chief work of the army is to fight, but no army, even in war, spends a tithe of its time in battle. Its energy is devoted to preparation and to manœuvring for position. It is precisely in this endless labor of preparation that the machinery of *administration* plays its part. It is in efficient management, rather than individual fighting ability, that the superiority of an army now consists. The General Staff with its centralized administrative powers is intended to bring about this change in the American army. Under the law of 1903 the Staff consists of a variable number of officers of different ranks, taken from all arms of the service, infantry, cavalry, artillery and engineers, and assigned for a limited time to staff duty. The Chief of Staff is the head of this organization and in reality of the entire army. The duties of the Staff cover every phase of administration and in war time include even the command and discipline of the troops. The Staff must approve all draft plans of campaign, offensive and defensive, against foreign powers with whom we may come into conflict. In order to do this it must provide in detail for the arming, uniforming, equipping, provisioning and transportation of prospective armies in case of a possible war. In this work the German staff is the recognized model of efficiency. In its mobilization of 1914, each soldier was provided with a new uniform

and outfit, and a card showing the rendezvous of his company. The owners of horses, motor cars and vehicles of whatever description were registered and their property taken over immediately for the purposes of mobilization. The number of men, horses, etc., which could be accommodated in freight cars, was recorded in advance, so that without the slightest delay or confusion each army moved to its appointed task. It is this care for infinitesimal details, as well as for the great outlines of strategy, which has so universally commended the German plan of army management to the military world. The keynote of the German system is effective *administration*, under the guidance of a centralized head. Our American General Staff has now been reorganized on this basis.

**Organization of the Regular Army.**—The present organization of the army is governed by the Acts of February 2, 1901, January 25, 1907, April 23, 1908, and amendments; it consists of

Cavalry: 15 regiments, 756 officers, 12,775 men.

Field Artillery: 6 regiments, 236 officers, 5,220 men.

Coast Artillery: 17 regiments, 672 officers, 19,321 men.

Infantry: 30 regiments, 1,530 officers, 25,231 men.

Engineers: 3 battalions, 2,002 enlisted men.

Porto Rico regiment of infantry: 32 officers, 576 men.

In addition to the above organization there are the staff corps, the service school detachments, military academy, Indian scouts, etc., amounting to 11,777 officers and men. In the Philippines there is permanently stationed a provisional force of native scouts composed of 52 companies, 180 officers and 5,732 men. The law provides that the total enlisted strength of the army shall not exceed 100,000 men. The entire area of the United States and its territories is divided into six main departments, the eastern, the central, the southern, the western, the Philippines and the Hawaiian, with a Major General or Brigadier General in command of each. The larger departments such as the eastern and central are divided into districts. The number of troops in each department varies widely, the larger number being in the Philippines department, and the smallest in the Hawaiian. Little or no attempt has been made to fortify the outlying military departments in the dependencies except the Panama Canal, and it is generally recognized that a well-equipped foreign enemy could readily deprive us of these possessions.

**The Militia.**—The militia is provided for in Articles I and IV of the Constitution, and by the military law of the United States, notably the Act of May 27th, 1908. This law provides two bodies of militia, the unorganized, which consists of every able-bodied male citizen and every foreigner who has declared his intention to become a citizen, from the age of 18 to 45 years. There are exemptions from this service, including certain government officers, members of Congress and persons specially exempted by the laws of the States, also the members of any recognized religious sect whose creed prohibits participation in war. The organized militia con-

sists of such of the above persons as are actually enrolled in the State forces. The Federal Militia Act requires the organization, instruction and discipline to be the same as that of the regular and volunteer armies of the United States. The President may fix the minimum number of enlisted men for each company and troop. The Act further requires each State to have an annual inspection and review and a certain number of meetings for drill by each company during the year. The Secretary of War has also provided opportunities for the militia to take part in the maneuvers and encampment of the regular army. Officers from the Federal establishment are detailed to attend State encampments and to give instruction. Four million dollars is annually appropriated by Congress for arms, stores, camp equipage, and other expenses of the militia. This is apportioned among the different States by the Secretary of War according to the number of Senators and Representatives from each State, but it is given only to those States which have at least one hundred militiamen properly organized, for each member of Congress.

**Reorganization of the Militia.**—Our people have never taken the Army or the Militia seriously. We are inclined to ridicule "war scares" and to treat lightly those who seek to establish our military preparations upon a firmer basis. In consequence, both the regular army and the militia itself have only a serio-comic meaning to the average citizen in time of peace. This is reflected in the unwillingness of Congress to face squarely our military problems and attempt to solve them by modern methods. There are two chief obstacles to the solution of these questions, which are now engaging the attention of our military authorities. (a) The Constitutional difficulties in reorganizing the militia, and (b) the unwillingness of the people to prepare for war until war breaks out.

(a) The Constitution provides in Section 8, Article I, that "Congress shall have power to provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions." A second glance at this clause shows that the militia may not be used outside the United States, but must be employed exclusively as a defensive force inside the national boundaries. Naturally no military operations can be confined to territorial boundary lines. To be of full service all our military forces must be at the undisputed command of the Federal authorities, regardless of where they are to be used. A worse restriction is placed by Section 8, Article I of the Constitution, upon the Federal control of the militia,—in that Congress is authorized "to provide for organizing, arming, and disciplining the militia," etc., "reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." It is inconceivable that the militia could be properly managed under Federal control so long as the States themselves carry out its training and appoint its officers. This

clause has been the loophole by which political appointments, wire pulling, inefficiency and even insubordination have crept into the military service. The experiment of a State-controlled, State-officered militia, which can be used only within the boundaries of the United States has been a failure. The seriousness of this problem may best be seen from the fact that whenever war breaks out Congress is obliged to provide for a separate volunteer army and to allow the militia organizations to *leave the militia* and enroll in the volunteers. This was done in 1860 and 1898. Numerous military writers have pointed out that this means that the militia as militia is not serviceable in time of war but must be transformed and brought under complete Federal control before it can be used effectively. The best authorities agree that our difficulties arise therefore from a complete misunderstanding as to the purposes and methods of use of a militia force. We are unable to train an effective force in less than two years. The regular army of 100,000 men must serve the purpose of first line troops for immediate use at the outbreak of any conflict to bear the burden of hostilities until the citizen soldiery can be prepared for action. This latter is the point at which our militia falls short. We have persistently ignored the fact that no foreign nation with which we might have hostilities, relies upon citizen soldiery for its offensive force; the main purpose in foreign countries, both European and Asiatic, is to secure a decisive advantage at the outset of the conflict by throwing into action an overwhelming force of completely trained soldiers. This means a difference of two years of preparation between our possible opponents and ourselves. This is the real center of the problem of military organization in the United States and it is this disparity in the time required for preparation between ourselves and certain aggressive foreign nations, which the military authorities of our government are seeking to remove. A well-qualified writer says on this point,<sup>1</sup> "But none of our possible enemies of the future will rely upon improvised armies, for the present political and military organization of the world is such that all the great powers can develop their maximum military power in a few weeks. It is obvious, therefore, that a rich and powerful nation that requires a year or two years to get ready, can be no match even for a smaller nation, if that smaller nation can develop its full military strength in a month or six weeks. We are fond of speaking of our capacity to raise an army of a million men. We undoubtedly have this capacity, but under present conditions, we will not be able to accomplish it until some months after the termination of any serious war that is within the bounds of human possibility. There is a great difference between ultimate military resources and effective military power. A nation's ultimate military resources are measured by the total number of able-bodied citizens capable of

<sup>1</sup> Major John M. Palmer, 24th Infantry, "The Militia Pay Bill," *The Infantry Journal*, November, 1914.

bearing arms, but her effective military power is measured by the number of trained soldiers which she can assemble in time to meet a given military emergency. In short, *Time* is the dominating factor in the equation of power, whether we be speaking of mechanical power or of military power. Our ultimate military *resources* are much greater than Germany's, but in one month Germany can develop ninety times as much effective military *power* as we can develop in the same time. Germany can develop and deploy her maximum military power against the united front of Europe in two weeks, while it would take us more than two years to develop our maximum military power even if we had no enemy to interfere with us or to disturb the operation. But it is not necessary to adopt Germany's military institutions in order to solve our military problem. Our traditional military policy is just as sound for us as the policy of the "Nation in Arms" is sound for her. According to our traditional policy, we should have a small regular army sufficient for peace requirements and strong enough to sustain the first sudden shock of war, with means of expanding this peace nucleus into a great war army of citizen soldiers. The main difference between us and Germany is that while she has converted her traditional policy into a fact, we talk a great deal about our policy but have never converted it into an actual institution. Our regular army is not properly organized as a peace nucleus, and sound methods for accomplishing the great war expansion have never been embodied in our laws.

We have never been able to reduce our war preparations to a business-like system, and in the absence of system, our military institutions have always been hastily molded by political intrigue at the time of national crises. For this reason the chief characteristics of American military history have been extravagance and inefficiency."

With these thoughts in mind the military authorities have sought to work out two solutions of the problem,—to reorganize the militia under a more extended Federal control, or to establish a species of reserve army under direct Federal management and leave the militia entirely to the States, without further Federal subsidies or assistance.

**The Plan of 1913.**—The General Staff, through its division of militia affairs, on August 1st, 1913, issued as Circular No. 8, the newly adopted plan for the reorganization of the militia upon a more effective basis and under a more extended Federal control. The Circular is based chiefly upon the recommendations of "A Report on the Organization of the Land Force of the U. S." issued by the War Department in 1912. The main features of this plan may be briefly summarized as follows:

1. In time of peace each State and Territory is to be considered as a territorial militia department, with the governor as Commander in Chief of each Department. Each Commander in Chief is to have

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ative staff which in numbers, duties and organization  
n to the general regulations of the War Department.  
d militia of each State shall constitute a "division."  
nal extra officers on the staff of the governor shall not  
with the line or staff of the militia in the division.

ministrative staff is to be proportioned to the size of  
ion of the State and the number of troops.

ision" as prescribed in field service regulations con-  
infantry brigades of three regiments each; one regiment  
ne brigade of field artillery (two regiments); one battal-  
ers; one battalion of signal corps; four field hospitals;  
ce companies; one ammunition train; one supply train;  
n. Those divisions which fall short of the above re-  
fter June 20th, 1915, lose their status as divisions and  
a major general in command and become brigades or  
They also lose their divisional organization.

ntry brigade consists of three regiments; a cavalry  
vo or three regiments and a field artillery brigade of  
regiments. An infantry regiment consists of three  
four companies each.

s organization to the militia as it exists, the war  
has established in all twelve divisions of organized  
hese divisions there are now 120,000 men and about  
s. If brought up to the full strength these 12 divisions  
70,000. Such is the plan proposed and now sought to  
by the War Department. That even this moderate

**The Relation of the Army to the Government.**—One of the grounds of perpetual disturbance in all the military States is the question—Shall the Army be subordinate to the representative government?—This question has never been satisfactorily solved. If a government is truly representative and responsible to the people the legislature will attempt to control the army organization. This means the subordination of the duties and acts of the military officials to the will of the legislature. Such subordination undoubtedly causes some weakness and inefficiency in the army itself. At the point of contact between the political representatives and the army chiefs, party influence must inevitably creep in with its paralyzing effects. Even in our own country this influence is clearly apparent. On the other hand, if the army becomes largely independent of the legislature, as it has in many countries of Europe, a ruling clique is soon set up which practices many irregular and illegal abuses, all of which are justified on the plea of “national defence.” In the celebrated “Affaire Dreyfus” in France the Army clique was willing to bring the country to the verge of a revolution rather than submit to an investigation of its illegal actions. The Krupp scandals in Germany showed that the arms manufacturers were willing to resort to criminal practices in order to create a demand for their product and to bribe German army officers in order to secure information as to pending contracts. In the United States the evils of militarism are not as yet experienced except in the financial burden imposed by our army and naval budgets, but if another war should involve us we must undoubtedly expect to face the same difficulty of political appointments, contract wire pulling and other forms of favoritism and inefficiency which we have experienced in the past. Military efficiency and representative government are incompatible. But we can lessen and remedy the defects which flow from the incompatibility by creating a strong reserve of officers, administrators and private soldiers whose military knowledge and ability have been trained and tested under Federal control in time of peace.

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*Annual Report for 1914 of Brig. Gen. A. L. Mills, Chief, Division of Militia Affairs, General Staff.*

#### QUESTIONS

1. How would you explain the large amount of space devoted in the Constitution to the war power, as contrasted with that devoted to other affairs which now seem more important?

2. Draw a contrast between the exact authority conferred by the Constitution upon the President and Congress respectively over the declaration and management of a war.



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war declared? Give some illustrations.

Why the President with so little nominal power over the declaration nevertheless such great influence in bringing on or avoiding a

A formal declaration of war always precede hostilities? Examples. In how an advantage may sometimes be gained by beginning before the declaration, or by delaying the declaration even after it begun.

Is an ultimatum, and why does it usually lead to war when demanded by a great power to another?

What are the legal preliminaries leading to the outbreak of the Spanish-

Does our Constitution limit each appropriation to the army to a certain number of years?

What is the proportion of our total national government appropriations devoted to the military and naval outlay.

What is Cuba sometimes spoken of as a "sphere of influence" of America? What is the Platt Amendment called an amendment? Explain its chief

What is the difference between military and civil administration and what are the chief problems of army organization.

What is the principal difference between the American Army organization of that of 1898?

What is a General Staff required, and what are its duties?

What is the exact way in which it increases the efficiency of an army.

What is a report showing the organization of the American regular army.

What is the difference between the regular army and the militia? Outline the principal provisions of the Militia law as passed by Congress.

How do the provisions of the Constitution on the militia interfere with the efficiency of that body in time of war.

What is the problem of army and militia organization of this country compared with that of European countries.

Why does Congress at the opening of a war does not call the militia

## CHAPTER XIII

### THE POWERS OF CONGRESS—Continued CONTROL OVER THE TERRITORIES AND OTHER POWERS

**Our Colonial Empire.**—The new conditions of American political life are strikingly shown by the rise of our colonial empire. The dramatic events of 1898 suddenly brought the nation face to face with a new problem,—the government of distant dependencies. For this work we had neither experience nor liking. Our only effort in this direction, the government of Alaska, was a notorious failure, and a large part of our population was strongly opposed to any extension of American control over additional territory. The war with Spain, the annexation of Hawaii, the purchase of the Panama strip, suddenly placed in our charge Cuba, the Philippines, Porto Rico, Guam, Hawaii, and the Canal Zone, none of them accustomed to our form of government nor inhabited by our race. The constitutional basis of our control over this empire rests first, upon Article 4, which gives to Congress the power to “dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;” and second, upon the authority which Congress possesses as a part of national sovereignty to acquire territory. Such power to acquire necessarily includes the right to govern new acquisitions.

Congress has used these powers in a series of laws called “organic acts” which in fact are the constitutional law of each new dependency. In passing these laws we have paid little or no attention to the rich colonial experience of other nations, and have thereby caused ourselves no little trouble. We have started to work out our own solution of the problem. In each dependency we began with a military control following the war; later Congress has established a highly developed popular government, in most cases somewhat too far in advance of the needs and ability of the people. Finally we have settled down to an effort to administer this plan of government in as liberal a spirit as possible. The great bulk of this work has devolved upon the President and his advisers. In the early stages of our colonial policy the President was practically the dictator of colonial administration. In the memorable clause added to the Army Appropriation Bill of March 2, 1901, the President was entrusted with the absolute control of the Philippines until Congress

the organization of the governments of all the islands, and the efficient and progressive administration through the various stages of American sovereignty. The islands have had a good start. To settle everything possible in Honolulu and San Juan was the motto of the Administration. While the central government in Washington have thereby escaped a great deal of criticism, they have been able to keep in close touch with the islands through frequent conferences between the President and other executive officials from the dependencies. To concentrate the control over the dependencies they have established a special Bureau of Insular Affairs in the War Department under the direction of an experienced army officer. In addition to its ordinary functions the Bureau has become an extensive agency for the islands, a means of preparing necessary legislation to be introduced in Congress, and last but by no means least, an effective press agency by which the public is constantly kept informed of important happenings in the colonies.

The systems of government adopted for the territories and dependencies are as follows:—The Philippine Act of July 1, 1902, provides for a legislature of two chambers, the lower chamber being the former Philippine Commission, the members of which are chosen by the President, the upper chamber being elected by the people upon a suffrage qualification fixed by the Commission. The members of the upper chamber perform executive and legislative duties, being charged with the duties of cabinet offices. President Wilson appointed for the first time a majority of natives in the Commission. The Government has extensive appointing power and the

authority, besides the command of the constabulary and the control over the United States military force stationed in the islands. The local governments are organized as provinces and *municipios* or townships under a law passed by the Philippine Commission. In the province there is a local government, partly appointed and partly elected; in the municipality it is principally elected by the people under suffrage qualifications requiring either education or property.<sup>1</sup>

All the important and arduous work of organizing the government and giving it an impetus in the right direction has been performed by an appointed commission of Americans and natives. These men have coped with the gigantic problem of creating a new government, suppressing chronic ladronism or thievery, stamping out plague, cholera and smallpox among a people many of whom were intensely ignorant, hostile and superstitious, devising a new system of taxation, counteracting the paralyzing effects of widespread devastation and famine, inciting the people to renewed industrial activity, attempting to win their confidence and educate them for some degree of self-government. The popular assembly has been elected by a political party which demands immediate independence from American control, but its members have shown a willingness to co-operate with the appointed upper house in the passage of necessary laws.

Hawaii is the farthest advanced in civilization of all our dependencies. It has therefore been given the most independent system of government, closely approaching that of the mainland territories or embryo States. The law of 1900 provides a legislature, both houses of which are elected directly by the people under an education qualification. The Governor and his Cabinet are appointed by the President as are also the principal judges. The general average of education is very high among the native Hawaiians, but not among the Chinese and Japanese, who constitute a large part of the population. The local governments were origi-

<sup>1</sup> The regulations governing suffrage are prescribed by the municipal code as passed by the Philippine Commission on January 31, 1901, and are as follows:

"The electors charged with the duty of choosing elective municipal officers shall be male persons, twenty-three years of age or over, who have had a legal residence in the municipality in which they exercise the suffrage for a period of six months immediately preceding the election, and who are not citizens or subjects of any foreign power, and who are comprised within one of the following three classes:

"(a) Those who prior to the 13th of August, 1898, held the office of Municipal Captain, Gobernadorcillo (local official), Alcade (mayor), Lieutenant, Cabeza de Barangay (village chief), or member of any Ayuntamiento (municipal council).

"(b) Those who own real property to the value of 500 pesos, or who annually pay thirty pesos or more of the established taxes.

"(c) Those who speak, read or write English or Spanish."

"It will be seen that in addition to the qualifications given in the first paragraph, an elector need only have one of three qualifications mentioned under a, b and c. Electors are also required to subscribe to an oath of allegiance to the United States sovereignty.

nally mere districts, administered by officials appointed from the central government at Honolulu but an elective town and county system has been drafted from American models.

Porto Rico, the smallest and most densely populated of the island dependencies, occupies a stage midway between Hawaii and the Philippines, both as to general advancement and governmental form. The law of April 12, 1900, has provided a bi-cameral legislature, the lower house elected, the upper house, or Executive Council, appointed by the President. Of the eleven members of the Executive Council, five must be natives of the island. Six of the Council members are the heads of important executive departments and the President has followed the practice of appointing Americans to these positions, thereby securing a majority of Americans in the Council and giving all the leading executive departments to Americans. Doubtless in the course of time it may be found advisable to place Porto Ricans in these positions, but in order to maintain American control over the upper house of the legislature, this plan was considered a necessary safeguard. In practice, with few recent exceptions, the native members of the Council have co-operated most heartily with the Americans in most of the essential measures of improvement and reorganization. Occasionally the lower house refuses to concur in financial measures; in order to prevent a deadlock in such cases the law provides that if the two houses fail to agree on revenue and appropriation bills, the law of the preceding year shall remain in force.

The local governments, reorganized on an excellent plan proposed by the commission which codified the insular laws in 1900 and 1901, are municipal in character, with a local council and mayor. There is in all our dependencies a much greater power of central supervision and guidance over the local districts in order to insure the efficient maintenance of new American methods in the local governments; but such centralization as exists is vastly less in extent than that maintained under Spanish dominion.

Of all our new possessions it may be said that certain fundamental needs are apparent and that the governments for perhaps another decade may be obliged to concentrate attention upon these vital questions; they are roads, schools, agricultural and industrial development and a just system of taxation. For some reason Congress has not provided for immediate action on a large scale in the first two of these fields. Because of the slow and painful progress which is being made in road-building, particularly in the Philippines, vast sections of the most fertile and productive land are excluded from markets. All the island dependencies are taxing their resources to the full limit for road-building but when it is remembered that in the Philippines and Porto Rico under Spanish control few roads of permanent value were constructed and maintained, the amounts now expended seem inadequate. In the Philippines the difficulty was aggravated by the refusal of Congress

to allow Philippine products to enter American markets free of duty until 1909, thereby retarding the natural recuperation of the archipelago from the effects of its long and disquieting internecine strife and recent economic losses. A large loan to all the insular treasuries from the National Government, even at the risk of limiting for a time their financial independence, would remove the most serious obstacle, and would thereby enable the local administrative officials to complete in a short time the destruction of those fundamental barriers to progress,—ignorance and inaccessibility. In no field of our colonial administration has the lack of funds such serious consequences as in that of education. A glance at the reports of the insular officials in charge of public instruction shows that in spite of the most liberal appropriations which the insular treasuries can bear and a highly efficient administrative personnel, the public schools reach only a minor portion of the children of school age. Taking for example the Philippine conditions, we find that for the last reported school year, 1912-13, there was a total attendance of 463,000, which is a trifle less than one-third of those who should be in school. Over 1,000,000 children in the archipelago are not provided with educational facilities, and in the words of the report: "this condition is largely due to insufficiency of funds." The Insular government, the provinces and the municipalities in the Philippines expended \$3,500,000 or about 47c per capita of the population; while in the United States we spend \$4.45 per capita, nearly ten times as much. A very small outlay from the Federal treasury or a loan guaranteed by the National Government would speedily remedy this condition.

The problem of equitable taxation arose from the antiquated system bequeathed by Spain. The richer classes, almost without exception, escaped tax paying, leaving the burden of the government costs to the poor. This was arranged by taxes on food and the necessaries of life, upon small retail dealers, octroi taxes (duties upon goods entering the towns) and a ruinous tax upon certain colonial exports. Vexatious fees and other duties were also collected for trifling services by government officials. The corrupt methods of administering the law were far worse than the legislation itself. The American administrator has substituted for this system a general property tax so arranged as to fall principally upon the wealthier classes. Its administration does not admit of the same amount of "favours to friends." As a result the burden of taxation is more equitably distributed and a larger revenue is actually collected with less cost to the people.

**Does the Constitution Apply to the Territories and Dependencies?**—An important distinction is to be made between different parts of the territory owned or controlled by the United States. In the States all portions of the Constitution apply, as they do also in the incorporated territories, such as Alaska, Hawaii, and the District of Columbia, but in those districts which are not in-

corporated nor technically a part of the United States, and are held in the national possession, such as the Philippines, the Panama Canal Zone, Porto Rico, Samoa, etc., the usual restrictions upon the United States Government, contained in the Constitution, do not apply, and the people of each dependency may constitutionally be tried without a jury and their political and civil rights may be adjusted in such ways as the National Government finds necessary or expedient. The only universal prohibition or limit placed upon the powers of Congress, which operates in every district controlled by the United States, is the 13th Amendment which prohibits slavery in the United States "or in any place subject to their jurisdiction."

**The Admission of New States.**—The Constitution provides that new States may be admitted by Congress. It was originally intended that these new commonwealths should be formed from the territory then owned by the National Government, but with the acquisition of new tracts of land extending to the Pacific, a number of new districts were populated by immigration and were admitted into the Union until the present number, forty-eight, has been reached. There now remains only Alaska, on the mainland and Hawaii, Porto Rico, and the Philippines among the insular possessions, which have not been admitted. All of these demand and expect either statehood or independence. There is no constitutional reason why the islands could not be admitted if they became sufficiently advanced in civilization, prosperity and the ability to manage their affairs. Hawaii has already reached this point and Porto Rico is nearing it.

The usual procedure in admission is an enabling act passed by Congress authorizing the inhabitants of a territory to hold a constitutional convention and to prepare the draft of a new State Constitution. When this draft has been formally presented to Congress and approved by that body, a date is fixed in the final act of Congress at which the new State shall spring into being. In approving the draft of the new Constitution, Congress may, and frequently has taken the occasion to require certain provisions to be incorporated in the new Constitution, and in some instances the Executive has let it be known that he will veto admission if the new Constitution contains obnoxious features. President Taft in 1912 vetoed an act of Congress, approving the State Constitutions of Arizona and New Mexico because they contained a provision for the recall of judges by popular vote. The President held that a new State should not start out on its career as a commonwealth under the handicap of a dangerous institution which would deprive the judiciary of its independence. The provision objected to was thereupon dropped and the new States admitted. When Utah was admitted, it was stipulated by Congress that the new Constitution should contain a provision prohibiting polygamy.

The admission of these three States has brought to light an interesting undeveloped part of our constitutional law. Could Utah,

once admitted, amend her Constitution and permit polygamy? Could Arizona and New Mexico reinsert in their Constitutions the provision for a recall of judges by a popular vote? Can a territory, once admitted as a State, "change its mind" and reinsert in its constitution by amendment a provision objected to by the national legislature when the territory was admitted? Or can it drop from that constitution a provision required for admission by the Congress? The prevalent view is in favor of the State's right to do so, *Coyle v. Smith*, 221 U. S. 559, 1911. There are cogent reasons on both sides. Those in favor of the right to amend declare that if the State does not possess this right it is placed on a different footing from other States already admitted. We should then have "classes" of States, some with greater power than others; some with the ability to regulate marriage relations as they choose, others without this prerogative; some with the power to adopt popular checks upon the judiciary, others without such a right. It is unthinkable, the advocates of this view declare, that the framers of the Constitution intended to vest in Congress any such power to cripple the State sovereignty permanently in some commonwealths, while allowing it free play in others.

Those who hold the opposite view advance two strong arguments in its favor: first, that the State when admitted makes a solemn agreement with the Nation to observe certain deep, fundamental principles of constitutional law which are considered so vital as to be made a condition of entrance to the Union. To declare that this solemn obligation holds only during the brief period of admission and that the State, once admitted, may immediately revoke its action, is to hold that the State's word was given in a spirit of deceit and subterfuge and that the Nation is helpless to enforce its pledges against its own members. Second, the clear language of the Constitution offers much support to the theory of binding force of agreements made at the time of admission. Section III, Article 4, declares that "new States may be admitted by Congress into this union:" Article 6, Clause 2, declares, "this Constitution, and the laws of the United States which shall be made in pursuance thereof, etc.,—shall be the supreme law of the land;—anything in the Constitution or laws of any State to the contrary notwithstanding." This clause lends support to the view that the admission of a State by Congress, having been enacted by a law, becomes a part of the supreme law of the land and the conditions under which this admission is stipulated are also essential parts of that supreme law. Once this is admitted, the whole question devolves upon a single point—what is the intent of Congress in passing the enabling act? This intent, like the purpose of Congress in passing any other act, then becomes subject to the usual rules of interpretation. Accordingly, the refusal of the President to sign an act admitting two territories until a change in their Constitutions was made would not bind them permanently, since it is a simple refusal by the President to concur in the act of Congress,



but a positive condition inserted by Congress in an act admitting the State would become, when signed by the President, a law of the United States and would seem to have such permanence and fundamental force as to render it a part of the "supreme law of the land."

**The Panama Canal.**—In 1902 the United States purchased from a French company and from the Republic of Panama the site and rights of the Panama Canal which had been partly excavated by the French corporation. By the law of June 28th, 1902, it established a commission of seven members appointed by the President and Senate with full authority over the canal zone including the work of construction. The general powers of the commission as a governing body were executed by its chairman, while the active work of construction was carried on by the chief engineer. A strip of territory five miles wide on each side of the canal was taken by the Canal administration and paid for by the United States, the price being fixed by a joint commission of four members composed of representatives of Panama and the United States. This strip has been laid waste and all human habitation forbidden, except by agents of the canal administration, the purpose being to protect the waterway in time of war. Both ends of the canal are fortified. The results secured by the commission astonished the civilized world. Previous to the American control of the canal strip the French engineers had been engaged for decades in the construction work and had been defeated only by the insuperable obstacle of yellow fever. It was a known certainty that every white man who went to the canal region must succumb if he remained there only a few years. Meanwhile the experiments made by physicians in various parts of the world within the previous five years, had shown that the chief means of spreading yellow fever was the mosquito. The American engineers began their work at this point. Under the direction of Colonel Gorgas a war of extermination and prevention was started against the mosquito, the swamps were drained, pools filled in, stagnant water sprinkled with petroleum, and in a short time yellow fever and other epidemics were wiped out. Upon the basis of healthful sanitary conditions the remainder of the work has been pushed energetically, and although it was seriously hindered by political influence in appointments, and by the intrigues of certain interests opposed to the canal, it was completed before the date originally set for its opening. The cost has been \$350,000,000. The highest number of men engaged 40,000. The United States government has issued \$130,000,000 of canal bonds to pay for the construction, and arrangements are made to retire these bonds within thirty years. The remainder of the cost has been paid from current funds. The tolls charged ships in passing through the canal are fixed at \$1.20 per net ton (100 cubic feet) for ordinary vessels and \$1.50 per ton of displacement for warships.

On August 24, 1912, Congress passed an act providing for the opening, maintenance, protection and operation of the Canal and

the government of the Canal zone. The Zone includes a strip 10 miles wide, running from a point 3 miles from the shore in the Caribbean to a point 3 miles from the coast in the Pacific, and including the group of islands in the Bay of Panama. The President is authorized to declare any and all land in the Zone to be necessary for the construction and operation of the canal and to take title to such lands for the government. He is also authorized to establish and has established a new government to supersede the Canal Commission which built the waterway. This new government consists of a governor and a number of department chiefs subordinate directly to him.

Authority is also given to the governor to divide the Zone into districts and determine the location of towns and cities, and establish a magistrate's court in each district. One district court of the United States for the Zone is established by the Act. Rules and regulations governing the right of any person to enter or remain in the Zone are made by the Governor and it is made a felony to injure or obstruct the waterway. Railway companies are forbidden to own, control, or operate any ships through the canal which do or may compete for traffic with such railways. The fact of competition is determined by the Interstate Commerce Commission. Vessels belonging to corporations which are violating the Sherman Act are forbidden to pass through the canal. In time of war or when war is imminent the President may designate an army officer to take charge of the Zone in which case the civil Governor becomes his subordinate. Following this Act, the President by executive order of Feb. 4, 1913, and Feb. 2, 1914, created the following executive departments under the direction of the Governor:

- Operation and maintenance,
- Purchasing,
- Supply,
- Accounting,
- Health,
- Executive Secretary.

The latter has general charge of the administration under the Governor's direction. The Governor himself reports to the Secretary of War.

**Naturalization.**—The Constitution confers upon Congress power to establish "an uniform rule of naturalization,"—In pursuance of this power two methods of naturalization have grown up. First, by general acts Congress has conferred citizenship upon whole classes of persons such as tribes of Indians, the inhabitants of new territory acquired by the United States, etc. By the Act of June 28, 1898, the Muscogee or Creek Tribe of Indians and the Choctaw and the Chichasaw Tribes were admitted to United States citizenship upon the breaking up of their tribal relations; the Act of April 30, 1900, provided that all persons who were citizens of Hawaii at the time of its acquisition by the United States, should be ad-

mitted to United States citizenship. On other occasions, the President and the Senate, in the exercise of their treaty-making power may provide that citizenship shall be conferred upon the inhabitants of territory acquired by the United States.

Second, the general and more usual method of naturalization is that prescribed by the revised statutes in sections 2165 and following, which provide that an alien must reside five years in the country before being finally admitted to naturalization. Two years before receiving citizenship he must make a preliminary declaration of intention to apply and at the end of that time (2 years after the declaration) he may make his final application for citizenship. Both the preliminary declaration and the application are made before a United States court or a State or territorial court of record. Among other formalities the applicant must renounce allegiance to any foreign power and must give up all claims to any title of nobility which he may have possessed. He must swear his fealty to the United States Constitution and laws and must present evidence of good moral character and of the necessary period of residence in the United States.

Not every alien may be naturalized under the general law. For example, no provision has been made for Asiatics. In fact, only two classes of persons have been provided for under the general naturalization act which, in section 2169 of the revised statutes declares:—"The provisions of this title (of naturalization) shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent." Since no mention is made of persons of Malay race or descent it is held that they cannot be naturalized except by special act of Congress or by treaty.<sup>1</sup>

When any naturalized citizen resides for two years in a foreign State from which he came, he loses his American citizenship, unless he makes a declaration before a Consular or diplomatic officer retaining his citizenship. Wives take the citizenship of their husbands, but upon the termination of the marriage relation, they may recover their original citizenship or nationality, by making a declaration to that effect. A child born outside of the United States but living here becomes entitled to American citizenship if its parent later is naturalized during its minority. The children born abroad of American citizens are entitled to American citizenship if they continue to reside abroad, providing that upon reaching the age of 18 they register with an American Consul their intention to become residents and remain citizens of the United States, and providing that upon reaching the age of 21 they take the oath of allegiance to the United States.

**Implied Powers.**—Surprisingly few of the subjects daily discussed by Congress are expressly mentioned in the Constitution. Congress enacts irrigation, meat and food inspection, corporation

<sup>1</sup> An exception has been made in favor of Hawaiians, Samoans, and Filipinos.

accounting laws, and many other measures; but the Constitution has nothing to say on such points. Where then did Congress secure the authority? The general rule for interpreting all the powers of Congress is given in the 10th Amendment: "The powers not delegated to the United States by the Constitution; nor prohibited by it to the States, are reserved to the States respectively or to the people." In short Congress has only the powers given it by the Constitution; all others are reserved to the States and to the people. For every law passed by Congress there must be some basis in the powers granted by the Constitution, either in the express powers, those given by the direct terms of the Constitution, or the implied powers, those which are not specifically mentioned but are derived or inferred from the express powers. For example, the power to build a post office is expressly given in the words of Section 8, Article I, Congress shall have power "to establish post offices and post roads;" the authority to prohibit the passage of objectionable literature in the mails is an implied power. It is inferred from the expressly granted authority over post offices and post roads.

Furthermore the Constitution confers on Congress the authority to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all others power vested by this constitution in the government of the United States, or in any department or officer thereof." This provision of Section 8 of Article I gives a still firmer basis for the implied powers. If Congress has the authority to provide a navy it must of necessity have also the right to take all steps which are "necessary and proper" to that end. Is the establishment of a training academy at Annapolis necessary and proper for the maintenance of a navy? Would a commercial or consular school for the training of officials be a fitting means of regulating commerce? Could Congress purchase and operate railways and roads as a regulation of commerce? Can Congress order battleships built in government yards instead of private plants? Can it regulate the manufacture of articles, intended to circulate in interstate commerce? In fact most of the interesting and important national questions of our time involve the implied powers. The answer to these questions depends upon the exact meaning of the terms "necessary and proper."

Chief Justice Marshall, the great expounder of the Constitution, in his famous decision on the case of *McCulloch v. Maryland*, 4 Wheaton, 316, 1819, ruled that the National Government had the power to create a banking corporation as a "necessary and proper" means of collecting and caring for the funds derived from taxation. The State of Maryland had contended that such action by the United States was unconstitutional, and that an implied power was "necessary" only when it was *absolutely required*, to carry into effect some express power. If the express power could be executed in any other way, then the implied power was not necessary, and hence it was unconstitutional. In overruling this

contention and deciding that Congress had the power to incorporate a bank, Marshall said,—

“Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the North should be transported to the South, that raised in the East conveyed to the West, or that this order should be reversed. Is that construction of the constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? . . .

“The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception. . . .

“This provision was made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which the government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it. . . .

“For example, the power to establish post-offices and post-roads. This power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is, indeed, essential to the beneficial exercise of *the power*, but not indispensably necessary to its existence. So,

of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offences is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment. . . .

“We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. . . .”

**Delegation of Legislative Power.**—Can Congress confer its powers upon any other authority such as the President, or the interstate commerce commission, or a State? The first clause of Section I, Article I, of the Constitution provides that “All legislative power herein granted is vested in a Congress.” This means that legislative power, if used, must be exercised by Congress and cannot be delegated to others. Congress cannot permit a State government to make congressional laws, nor can it authorize the President to pass laws that repeal them. In many of the cases in which it has done so, its action, if brought into the court, would have been declared illegal. But Congress can establish a general principle or legislative rule and authorize the President to apply this rule when the conditions require it, or upon a contingency arising which Congress foresees. This is not a delegation of legislative power but is merely an instruction to the President as to how a legislative rule shall be applied. It was early urged against the powers of the interstate commerce commission that the power to fix railway rates was legislative and that Congress could not delegate this power. If this view had been accepted by the courts, our entire policy of regulation of public service companies by executive commissions would have fallen; but in repeated instances the Court has held that the Commission in making rates is merely taking a general principle fixed by the law itself, viz. that rates shall be “just and reasonable” and is applying this principle to new cases. This is not making law, but executing it.

In *Field v. Clark*, 143 U. S. 649, the Marshall Field department store of Chicago protested against the payment of a duty on certain imported goods, claiming that the tariff act which imposed the duty, passed October 1, 1890 was unconstitutional on the ground that it authorized the President to suspend free trade in sugar, coffee, tea and hides and impose a duty on these articles coming from any

country which imposed unequal or unreasonable duties on the products of the United States, and that this was accordingly a delegation of legislative power. Congress, by this act, attempted to secure reciprocity. In order to do so, it fixed the higher rates to be levied upon articles coming from countries which would not grant reciprocity to the United States; it instructed the President, whenever he discovered such conditions, to impose the higher rates fixed by Congress upon the imports in question. The Supreme Court ruled that this was not a grant of legislative power but was merely the fixing of a legislative rule and that the President was only permitted to ascertain facts, namely, the inequality or unreasonableness of duties imposed on American products by other countries, and thereupon to apply the rule set by Congress.

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#### PROBLEMS—THE DEPENDENCIES

1. Resolved that the National Government has the constitutional power to acquire and govern dependencies. Defend the affirmative, and cite the appropriate clauses of the Constitution.
2. Explain how each of our present dependencies has been secured.
3. Prepare an essay or report on the government of the Philippines, showing the constitutional powers of Congress, the more important points in the organic acts governing the Philippines, and some of the chief problems in the administration of that dependency.
4. Prepare a similar report on the government of Hawaii, and explain why it is more liberal than that of the other dependencies.
5. A similar report on the government of Porto Rico.
6. The Philippine legislature is about to pass a bill which may be disastrous to the interests of the island. What can the President do to prevent its passage?
7. What can Congress do?
8. If the President believes that the administration of the Philippine laws is not being properly carried out what can he do?
9. Give your impressions as to the fundamental needs in our dependencies and their government.
10. What would be your attitude toward a large loan to the islands from the national treasury, for schools and roads?
11. Explain the chief changes in the principles of taxation introduced by the American government in our new dependencies.
12. How are new States admitted?
13. Can Congress admit a new State under conditions? Examples.
14. If a clause is placed by Congress in the constitution of a new State as a

condition of admission to the Union, could the State later drop this clause from its constitution?

15. Resolved that all parts of the Constitution apply to the dependencies. Defend the negative and cite your authority.

16. Prepare a report on the Government of the Panama Canal Zone.

#### PROBLEMS—NATURALIZATION

1. Resolved that Congress should have the authority over naturalization. Defend the affirmative.

2. A Chinese who has lived in the country seven years asks your advice as to how he should become naturalized. What would you tell him?

3. An Italian who has been here four years asks you what steps he shall take to become naturalized. What would be your advice?

4. Richard Roe is born of American parents residing in Paris. What determines his citizenship?

#### PROBLEMS—IMPLIED POWERS

1. Explain the doctrine of implied powers of Congress and give several examples.

2. Where does Congress get the authority to establish and maintain the naval academy at Annapolis?

3. Give Chief Justice Marshall's view of the implied powers.

4. State which of the following laws, if passed by Congress, would be constitutional and the parts of the constitution upon which the law could be based:

(a) Creating an agricultural college in Lincoln, Nebraska.

(b) In Washington, D. C.

(c) A mining college in Alaska

(d) Requiring the teaching of industrial subjects in all public schools.

(e) Establishing a special school for postal carriers.

(f) Forbidding the manufacture of dangerous explosives in any part of the United States.

(g) Limiting the hours of labor in all industries.

(h) Providing for the purchase and operation by the government of all railways in the United States.

5. Can Congress grant its legislative power to the States? To the President? To the interstate commerce commission? Explain and cite the constitution.

6. The tariff law of 1890 authorized the President to suspend certain articles from the free list and impose a duty on those articles when coming from any country which imposed unequal or unreasonable duties on products of the United States. Was this constitutional? Reasons.



## CHAPTER XIV

### THE NATIONAL CONSERVATION POLICY

**Rise of a National Policy.**—No country enjoys a greater diversity and abundance of natural resources than are possessed by the United States. The history of our people has been chiefly that of the conquest and subjugation of Nature. Until quite recently this natural wealth has been looked upon as practically unlimited. Our government policy has been simple,—to throw open the public lands to immediate settlement and encourage the settlers to exploit them to the full. As successful as this policy has been in making our country the wealthiest of nations, it was appropriate only to the stage of colonization. The settlers regarded forests, rivers, and other physical features chiefly as obstacles to be removed or overcome and it was hard to realize their value in the future economic progress of the country; so the forests were cut away, the farms were planted year after year to the same crop without fertilizer, the coal and mineral deposits were exploited with prodigal waste. Labor was costly and natural resources cheap. To save resources at the expense of labor would have been ruinous in the early settlement and development of our country, so that the main effort of our people has been to develop labor-saving machinery rather than the means of saving coal or timber or land or ore. The European who visits us is accustomed at home to seeing cheap labor with costly materials. The effort in Europe is to save such materials even at the expense of employing more labor. Our European visitor therefore regards us as the most extravagant of nations. As our conditions gradually change and the waste of resources brings us nearer to the danger point, the need for a national policy of conservation arises. No individual or association of individuals can save the natural resources from exhaustion. This must be done by the National and State Governments acting in harmony to protect the supply for future generations and to insure the proper and economic use of our natural wealth to-day. Conservation became a national problem during the administration of Mr. Roosevelt, and largely through his efforts and those of Mr. Gifford Pinchot, who was at that time the head of the Forestry Bureau. In October, 1907, a meeting of the Inland Waterways Commission was held at which the President presided, on board the steamer *McKenzie*, on the Mississippi River, and it was there decided to call a conference on the general subject of conservation of the nation's resources. Accordingly the President issued invitations to the Governors of the States and Territories to meet at the White House in May, 1908,

together with the members of Congress, and other delegates from the States and from national organizations. This Conference of Governors marks the formal beginning of a definite movement to conserve our resources.

**The National Conservation Commission.**—The White House Conference led to the appointment by the President of the National Conservation Commission, of which Mr. Pinchot was made chairman. This body was composed of about 50 members, and was divided into four sections: Waters, Forests, Lands and Minerals. The commission first made an inventory of our natural resources, and had its report ready for the second joint conference on conservation, held at Washington in December, 1908, by which conference it was endorsed. The three volumes of this report constitute a most remarkable census of our natural wealth, and the work of the commission has brought the whole problem of conservation into the fore-front of national politics.

**The Forests.**—Our forests now cover 550,000,000 acres, or about one-fourth of the United States. The original forests covered not less than 850,000,000 acres. The lumber industry began in the northeast, and has moved gradually westward and southward. Washington is now the principal lumber-producing State, with Louisiana second. Although only about 30% of our original forest area has been cut or destroyed, this portion represents the most valuable parts of our timber supply, especially in the north and east. The commercial supply of every kind of timber, except in the Pacific forests, has been seriously reduced, so that the price of lumber has been steadily rising.<sup>1</sup>

At the present rate of consumption, many of our most important woods are threatened with exhaustion within the next thirty or fifty years. We are now taking from our forests each year, not counting the loss by fire, three and one-half times their annual growth. Besides this there is a large amount wasted.<sup>2</sup>

Important steps towards a national policy have been taken in the creation first, of national forests, and second, of the Forest Service,

<sup>1</sup> Yellow pine costs 65% more at the mill than it did in 1900; Douglas fir costs 63% more; and white pine 53% more. White pine is so nearly used up that the lumber sawed from it in the Lake States has fallen off 77% since 1890, and since 1900 over 45% in the whole country.

<sup>2</sup> Since 1870 forest fires have each year destroyed an average of \$50,000,000 worth of lumber. Taking together the loss by fire, waste and destruction from other causes it appears that from 1,000 feet of standing timber taken from the forests, only 320 feet of lumber is obtained. But in addition to its effect on the wood supply the forest problem has a wide reaching influence on the river-flow, and thereby affects the questions of water power development, the improvement of internal waterways, reclamation of arid and swamp lands, the prevention of floods, and the preservation of the soil. Scientific forestry is a comparatively recent art, which has only been applied to a limited extent in America but it is estimated that with modern methods we should produce a constant timber supply beyond our present needs, and with it conserve the usefulness of our streams for irrigation, water supply, navigation and power. Under proper management our forests should yield over four times as much as they do now.

and its activities. Inasmuch as the public lands of the United States contain vast areas of valuable forests, Congress has passed laws providing for the withdrawal of forest lands from public entry, and their reservation as national forest reserves. Briefly these laws are as follows:

**Act of 1891.**—This act gave the President of the United States authority to set aside by public proclamation, any part of the public lands covered with timber or undergrowth, as public reservations.

**Act of 1907.**—Congress enacted that such forest reserves should be known as National Forests.

**Act of 1907.**—This law declared that no more forest reserves should be created in the States of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, *except by act of Congress*. When President Roosevelt saw that Congress was about to pass this law, he immediately issued proclamations laying aside 32 separate reserves, containing 17,000,000 acres of forests, in the six States enumerated in the Act, and thus rendered the Act practically void. The report shows the area of "national forests" in the United States proper as about 168,000,000 acres. There were also about 27,000,000 acres in Alaska reserved, and a few thousand acres in Porto Rico.<sup>1</sup>

Some of the States have begun to make reservations of forest lands. New York State has set aside as State forest reserves 1,600,000 acres, and in 1908, planted about 1,100,000 spruce and pine trees. Pennsylvania has reserved 900,000 acres, and is planting 400,000 trees each year. The Pennsylvania tax law is regarded as a model in this respect. It provides for a very low rate on such private forest lands as are submitted to State supervision, with a moderate tax on timber, which is not collected until the timber is cut. Oregon, Washington, California and Minnesota also own large forest areas.

**The Forest Service.**—The national forest service is a bureau in the department of agriculture, under the direction of a forester and

<sup>1</sup> National Forest Areas by States and Territories.

California.....	28,000,000 acres
Alaska.....	27,000,000 "
Montana.....	20,000,000 "
Idaho.....	20,000,000 "
Oregon.....	16,000,000 "
Colorado.....	16,000,000 "
Arizona.....	15,000,000 "
Washington.....	12,000,000 "

Besides the national forests, the Federal Government owns over 10,000,000 acres of forest lands in the Indian Reservations, and 2,500,000 acres in National Parks. The total amount owned by the Government represents about 1/3 of the total stand of merchantable timber in the country. Scientific forestry is being practiced on 70% of this area, and is being extended to all public owned forests. Less than one per cent of the forests privately owned are being managed scientifically. Generally speaking, the more valuable timber is on land owned by private individuals and corporations.

a number of assistants. It is divided into branches controlling operation and lands, silviculture and products, grazing, products, laboratory, and acquisition of lands. There are 163 reserves or national forests as they are now called, in order to avoid the impression that all forest lands are withdrawn from use. These are divided into six districts with a district forester and a staff of subordinates in each. The total number of employés is about 4,000, of whom slightly over 700 are employed in administrative laboratory and clerical work. The remainder who are rangers, assistant rangers, guards and wardens, are distributed throughout the forest tracts. Under the direction of Mr. Gifford Pinchot and Mr. Henry S. Graves this service has been made one of the most efficient in the government. The care and administration of the National Forests is its chief work but it also co-operates with the State bureaus. The purposes followed by the bureau are: protection against fire and depredations; the harvesting of mature timber; the maintenance and betterment of a growing crop of timber; the protection of the water supply; utilization of the forage crop; betterment of range conditions; establishment of better means of communication through the forests.

**Fire Prevention.**—The National Forests are protected against fire by a system of fire patrol. Combined with this are such measures as brush burning, fire lines, back firing, the construction of roads, trails, and telephone lines, and the use of lookout and observation towers. The most important feature is the patrol system. Rangers are stationed at convenient intervals throughout the forests. Their hardships and self-sacrifices deserve the admiration of the public. They enforce the laws against building fires in the forests, and keep a lookout for flames, to extinguish any which may spread. When a conflagration breaks out, they receive assistance from rangers in other districts. Many of the States have systems of patrol, or provide for fire-fighting by annual appropriations. Private owners have also formed co-operative fire-fighting associations. The national bureau often co-operates with these associations and with the State wardens. The increasing efficiency of the Federal service is well shown by the fact that as it has been enlarged and extended, the proportion of the public forests burned each year has steadily decreased.<sup>1</sup> The area that each ranger has

<sup>1</sup> The principal causes of forest fires are sparks from locomotives, carelessness of campers, and lightning. All experience shows that damage by forest fires is practically preventable. The most important principle in the prevention of fires, is to maintain such a complete patrol that fires may be extinguished in their early stages, rather than to try to fight them after they are well started. The cost of maintaining an efficient patrol is small, compared with the annual loss from fires. It is estimated that the \$50,000,000 annual loss in the United States could be practically prevented by the annual expenditure of \$10,000,000. Less than 1% of the private forest lands are now patrolled. It is considered even more important to prevent fires in regions where the forests have been cut and where only underbrush exists, because fires on such lands are apt to prevent re-forestation.

to cover (40,000 to 200,000 acres) is too great, however, and the number of rangers would have been greatly increased long since, had it not been that a faction in Congress has opposed all attempts to aid in the forest service.

**Forest Planting.**—Forest planting means the protection of denuded watersheds from erosion, and the protection of farm homes and crops from wind and cold, as well as an increase in the timber supply. The United States contains 65,000,000 acres of stripped land suitable only for the growing of trees, but which will not bear a productive forest again except through the actual planting of trees, or sowing of seeds. There are also in the west 16,000,000 acres of naturally treeless land which should be planted to trees in the interest of agriculture in the prairie region and on irrigated lands.<sup>1</sup> There are now 24 nurseries on the national forests, of which all but nine are small or merely experimental nurseries. Three or four of the largest have an annual productive capacity of from 1,000,000 to 4,000,000 trees.<sup>2</sup>

**Special Studies and Investigations.**—The Forest Service, besides practicing scientific forestry in the national domain, conducts a series of investigations in silviculture, embracing the collection of information concerning the growth and planting of trees; in the uses to which waste products of forest and mill may be put; statistics on mill products, prices of lumber, etc.; wood preservation and timber tests.

For several years there has been a strong opposition to the national conservation policy, both as to forestry and mineral lands, on the part of such States as Idaho, Montana, Washington, and Oregon, which have rather sparse populations and wish to attract new settlers by throwing open their natural resources to unre-served exploitation. As large parts of the national domain are located in these States the conservation policy naturally conflicts with local desires for quick development, even at the cost of the future. The members of Congress from these States have had placed in the forestry and land laws the proviso that no additional forestry reservations shall be created in certain western States except by Act of Congress. They have also succeeded in cutting down seriously the appropriation for the forest service, and disastrous forest fires have resulted. In deference to this opposition the Secretary of Agriculture adopted in 1913 a regulation by which any local associations whose members include a majority of the residents making use of the national forests may select a committee to meet with the local forest officers and the latter recognize the committee in settling questions which arise between the forest service and the public. A further step was taken by the depart-

<sup>1</sup> There have thus far been planted less than 1,000,000 acres, of which probably less than half is successful, because the planting has been done without adequate knowledge as to where, what and how to plant.

<sup>2</sup> *Annual Report of the Forester*, 1909.

ment in recommending to the President the restoration to entry, settlement and sale of certain reserved lands in the national domain which, after careful examination, proved to be of more value for agricultural than for forestry purposes. The department is also trying to increase the sale of timber from the national domain. For the year 1914 the receipts totalled \$2,500,000.

**The Minerals.**—The mineral production of the United States is valued at \$2,000,000,000 every year; this includes coal, iron, petroleum, natural gas, phosphates and other similar products. Together they form over 65% of the freight tonnage of the railways. It is estimated that the yearly waste in the extraction and treatment of these minerals exceeds \$300,000,000, a large proportion of which might readily be saved. It is estimated that while the annual consumption of coal is now about five tons per capita, there is an annual waste of three tons per capita; that although the proportion of that wasted to that utilized has diminished, yet to date the aggregate amount of waste has exceeded the aggregate amount actually utilized. The waste is attributed to two general causes. The careless and wasteful methods of mining,<sup>1</sup> and imperfect combustion in furnaces and fire boxes. The known supply of petroleum is about 15 or 20 billion barrels but new lands are yearly being exploited and production is increasing rapidly, but wastes are enormous. Our American supply threatens to become exhausted by the middle of the present century. Natural gas is the most perfect known fuel. The total yield per year is valued at about \$62,000,000. It is estimated that an equal amount is wasted by being allowed to escape into the air. Phosphate rock is used extensively for fertilizers. In most countries supplies of this mineral are guarded carefully. The United States exports it in large quantities. As it becomes more necessary to conserve our soil by artificial means, the domestic demand and production increases. The known supply cannot long withstand the increasing demand.

**Mineral Laws.**—Little effort has thus far been made to protect our mineral resources from waste or improper exploitation. The Act of 1910 authorizes the President to withdraw temporarily from settlement and sale any of the public lands in the United States or the district of Alaska and to reserve them for public purposes. This reservation continues until revoked by the President or by Act of Congress. On lands not so reserved entry and purchase may be

<sup>1</sup> The mining waste is largely due to leaving pure coal in the mines in the shape of pillars, partitions, etc., most of which becomes covered with broken stone and earth and is rendered unfit for future extraction. Much coal is left unmined because it contains impurities, such as earthy material, sulphur, etc. It is rich in carbon, however, and might be utilized to make gas, and operate gas engines, and in this way yield as much power as the same weight of pure coal used in steam engines. The mine waste now averages a little more than half the amount saved. The chief waste, however, is caused by imperfect combustion. Steam engines utilize on the average about 8% of the thermal energy of the coal. Internal combustion engines utilize less than 20%, and in electric lighting, less than 1% of the thermal energy is rendered available.

made under the law of 1873 which provides that an individual may acquire not more than 160 acres of mineral land and an association not more than 640 acres, at a price ranging from \$10 to \$20 per acre. The policy of the government on mineral lands should encourage their development and should seek to prevent the waste and misuse of lands that are developed.

**Proposed Changes.**—In order to reach these ends the national conservation commission advocates:<sup>1</sup>

That coal lands should be disposed of under leases only, the lease to safeguard the interests of both the mining investor and the public. That the area which may be leased should be made greater than the amount that may now be purchased under the law of 1873. That no patents shall be issued for any public lands in the future, except with a specific reservation of coal on those lands. That surface lands may be open to cultivators of the soil, and that the miner may be allowed to acquire, with compensation to the owner, such parts of the surface as may be needed in producing coal. That leases of coal lands shall be made by the Secretary of the Interior under such regulations as he may deem wise for the protection of the public interest, in reasonably limited areas, and at such charges, and for such periods as he may deem reasonable.

**The Lands.**—Within a century we may have to feed three times as many people as now, and the main bulk of our food supply must be grown on our own soil. Ultimately the present acreage may be nearly doubled by the clearing of millions of acres of brush and wooded land, and the reclamation of swamp and arid lands. But as our acreage is limited, and cannot increase with population it will be necessary to increase the yield per acre. The average yield of wheat in the United States is only 14 bushels per acre; in Germany 28 bushels, and in England 32 bushels. Our yield of oats is 30 bushels per acre, while England produces 45, and Germany 47. Although our soil is fertile, our mode of farming destroys its properties, and does not secure full crop returns. Soil fertility need not be diminished, but may be increased. Proper management should at least double our average yield per acre. The greatest wastes of our soil are due to preventable soil washing by floods and erosion, the growing of continuous crops year after year, and the neglect of fertilizers. Much of these wastes might be avoided by government action, both in educating the people and by a change in public policy. At the time of the adoption of the Constitution, the Federal Government came into possession of vast areas of what were then western lands through cession by the original thirteen States. This land, the "public domain," has been increased through the subsequent acquisition of lands, such as the Louisiana purchase, and the purchase of Alaska. The original public domain, including acquisitions of the United States proper and of Alaska 368,103,680 acres, making a total of over 1,800,000,000 acres, was 1,441,436,160 acres. The Constitu-

<sup>1</sup> Report, page 91.

tion provides that Congress may dispose of the public lands, and in exercising this power Congress has enacted much legislation providing for their disposal, until in 1909, the total area, exclusive of Alaska, had been reduced to about 380,000,000 acres. Nearly all that is left is arid or unsuitable for settlement for other reasons. The administration and sale of public lands are in the hands of the General Land Office, a division of the Department of the Interior. The Commissioner of the General Land Office is the administrative head of this vast domain. The policy of the government with regard to the disposal of public lands may be roughly divided into three epochs: sale, development, and reservation. During the epoch of sale, the government disposed of its lands with the main purpose of procuring revenue, and with little or no regard to settlement thereon. The Revolution left the new country in debt, and it was believed by the statesmen of that day that the most important source of revenue would be the sale of lands. In 1796 the first general land act provided for the survey and disposal of public lands by public sale partly on credit, to the highest bidder. A later amendment provided that land might be sold at private sale, but at a minimum price of two dollars an acre. In 1820, sales on credit were abolished, and the minimum price was reduced to \$1.25 per acre. During the thirties and forties there came about a gradual transition to the policy of development. Settlers began taking up the land and improving it, and it came to be recognized that people who had thus settled on and improved land should have a prior claim to purchase such land.<sup>1</sup>

**The Homestead Law, 1862.**—The theory that the public lands should be so disposed of as to encourage settlement and the development of the West, instead of for the purpose of raising revenue, crystallized in the homestead law of 1862, the most important of our general land acts. As now amended, any person 21 years old or over, who is a citizen, or who has declared his intention of becoming a citizen, and who is not already the owner of 160 acres, may make entry for 160 acres of unappropriated land. After such entry, he must establish his residence on the land within six months, and then must continue to reside upon, cultivate, and improve his land for a period of five years. At the end of this time, he may, upon furnish-

<sup>1</sup> This led to the Pre-emption Act of 1841 by which persons were allowed to settle on public lands, each settler being limited to 160 acres. By filing his claim at the time of settlement and by furnishing proof at the end of from one to three years (the time differing for different lands) that he had lived on and improved his land, he could then pay for and receive title to it. This pre-emption act was devised for the purpose of stimulating settlement and home-making, but it still provided for payment for the land at the end of from one to three years. It merely recognized the rights of those who had settled or pre-empted. Although the spirit of this law was timely, it was poorly enforced and became the subject of much abuse. Claims could be proved up with little or no residence. Much was taken up by speculators. People were paid by wealthy "land-grabbers" to take up claims on government land, and then sell out the claim. The law was not repealed until 1891.



ing proof of compliance with the law, make final entry, and come into full possession, without paying anything except the land office fees. The serious weakness of this law has been the so-called commutation privilege; at the end of 14 months, a settler under the Act may have the right to purchase the land at a minimum price of \$1.25 per acre, provided he can prove that he has lived on the land and improved it during that time. This commutation privilege has been much abused. The period of occupancy is so short that it often pays to make entry for speculative reasons, rather than for legitimate home-making. The Commissioner of the General Land Office has strongly advocated either the repeal of the commutation clause, or the lengthening of the time in which commutation proof can be made, from fourteen months to three years.<sup>1</sup>

**Timber and Stone Act, 1878.**—Among the other laws passed since 1862, perhaps the most important is the Timber and Stone Act of 1878. This law originally applied only to the States of Oregon, Washington, California and Nevada, but in 1892 was extended to all the public land. Under it, any person may purchase outright 160 acres of unappropriated non-mineral land which is unfit for cultivation, and valuable for timber or stone, at a minimum price of \$2.50 per acre. Such purchaser must swear that the land is to be used by himself alone, and that he is not purchasing for speculative reasons. False swearing renders the person guilty of perjury and involves forfeiture of the land and the money paid therefor. Although innocent on its face, this law has also resulted in great abuse. It has been the means by which a few large interests have secured at a nominal price thousands of acres of the most valuable forest lands in the United States. Its repeal has often been urged. Other laws, such as the Reclamation Act and the Carey Act, etc., are described in the section on Reclamation.

**The Era of Reservation.**—The third epoch in our public-land policy, that of reservation, begins with the conservation movement. The most important step taken has been the reservation of nearly 200,000,000 acres of timber land in the national forests. The policy is also manifest in the agitation to reserve water-power sites, to secure new laws on the disposal of coal-lands, and on the repeal or modification of the commutation clause of the Homestead Act. The recommendations on these subjects by the national conservation commission<sup>2</sup> are:

Every part of the public lands should be devoted to the use which will best subserve the interests of the whole people.

The classification of public lands for their administration in the interests of the people.

The timber, the minerals, and the surface of the public lands should be disposed of separately.

Public lands more valuable for conserving water supply, timber,

<sup>1</sup> 1909, Report, page 20.

<sup>2</sup> Vol. 1, page 19.

and natural beauties or wonders, than for agriculture should be held for the use of the people except for mineral entry.

Title to the surface of the remaining non-mineral public lands should be granted only to actual home-makers.

Pending the transfer of title to the remaining public lands they should be administered by the Government and their use should be allowed in a way to prevent or control waste and monopoly.

**Conservation of Waters** has to do with the regulation of the flow of streams so as to make them navigable, produce power, furnish water-supply to cities, and prevent floods or soil erosion. There are now 26,000 miles of navigable streams, and this mileage could be doubled by the improvement of waterways. As population increases and traffic becomes more dense, the possibilities of improvement become apparent, especially for the carriage of heavy and bulky articles of freight which can be transported much cheaper by water than by rail. The direct yearly damage by floods since 1900 has increased steadily from \$45,000,000 to over \$238,000,000. Floods also mean the waste of vast quantities of water. This could be largely obviated by the storage of waters in huge reservoirs in the upper branches of streams, and by the re-forestation of denuded catchment basins. The regulation of stream-flow also means a greater development of water power, a source of power which is becoming increasingly important. Under our present policy, water power sites have been neglected except by a few large corporations.

**Water Power.**—There are now being generated in the United States about 26,000,000 horse power by means of fuel, principally by the use of coal for steam boilers, and about 5,500,000 horse power by means of falling water. One hundred years ago, before the development of the steam engine, falling water was the only source of power, consequently all mills were located on streams. With the development of the steam engine and the exploitation of our coal resources, mills and factories have grown up without regard to the existence of water power.<sup>1</sup>

<sup>1</sup> It has been cheaper to establish the factory near the market, and burn coal to generate power, than to build the factory near water power and transport the goods to market. The possibilities of water power development have accordingly been neglected. Since the application of electricity to industrial purposes in the eighties, however, and especially since the transmission of electricity over great distances, water power has come into greater demand, and there has thus been an increased use of such power as well as the purchase and holding of power sites on a large scale for future development and use. The greatest distance that electrical energy is now transmitted is 220 miles, but it may be carried even further. The best examples of the use of electricity generated by falling water are in the Pacific cities, Los Angeles, San Francisco, and Seattle, and the region about Niagara Falls. It is estimated that in New York State water power is at least \$12.00 per horse power per year cheaper than steam power. As the chief item in the cost of steam power is the cost of coal, it follows that as coal becomes relatively more scarce and the price rises, the advantage of water power over steam for certain industries steadily increases. The available water power of the United States with conservation, approximates 200,000,000 horse power; in other words, we are now developing only about one-

The disposal of water power sites has been merely an adjunct of the public land policy under the Homestead Act; it has generally been possible for individuals to acquire land containing valuable water power without extra payment. Thus it has come about that within recent years a few corporations have come into possession of an amount of undeveloped water power equivalent to one-third of that now in use. An investigation of the Bureau of Corporations showed that thirteen corporations hold this amount. The danger in such ownership is that it would render any future policy of conservation so costly as to be almost impracticable.

This important phase of our water power development came before the public when, in 1908, the President vetoed a bill relating to a franchise for a dam on the Rainy River, Minnesota, on the ground that it prevented the best ultimate use of the river. In 1909 a similar bill permitting the construction of a dam on the James River in Missouri was vetoed and in a message to Congress at that time the danger of allowing the undeveloped water power to pass into the control of a few private interests was pointed out. In order to prevent this the President adopted the policy of withdrawing from entry public lands containing valuable power sites.

The Act of June 25, 1910, already mentioned, allows the President in his discretion to withdraw from settlement or sale any of the public lands of the United States or Alaska and reserve them for water power sites, irrigation or other public purposes.

The following recommendations covering water power sites were made by the Secretary of the Interior in 1910:

The title to such power to be reserved to the Federal Government, and the power to be leased, for a period not to exceed 30 years, with option of renewal, under certain conditions.

Lease to be forfeited unless a certain amount of power is developed within four years.

A moderate rent to be charged subject to revision every 10 years.

**Reclamation.**—This technical term includes the draining of swamp lands and the irrigation of arid wastes. Although we generally think of reclamation as irrigation there is much more land that may be conserved for agricultural uses by drainage of swamps. The area of swamp is estimated at 75,000,000 to 80,000,000 acres, located principally in Florida, Louisiana, Mississippi, Arkansas, Michigan and Minnesota. By the Act of 1850, the United States granted to the several States the lands which were classified as

fortieth of the power ultimately available, although much of this power cannot be used until far in the future because of the outlay of capital required for its development. The value of a stream for furnishing water power depends on its minimum flow. The difference between the maximum flow and the minimum flow of practically all our rivers is very great. The variation in flow of the Hudson River is as 100 to 1; and of the Delaware River at Port Jervis it is more than 300 to 1. The flow of the streams can be largely equalized by means of storing waters during flood seasons. This has already been done for comparatively small streams in New England. For the larger rivers its value is less.

swamps. Over 65,000,000 acres were turned over to the States under this law and by them all but 5,000,000 acres were conveyed to private holders. Only about 1,300,000 acres remain in national possession at present.<sup>1</sup> It is estimated that about 16,000,000 acres of swamp land, largely in the upper Mississippi Valley, have been reclaimed and converted into exceedingly profitable farm lands, and that the value of such reclaimed spaces is double or treble the original value plus the cost of drainage. Practically all the wet lands of the country can be reclaimed at profit, and the Conservation Commission estimates that they would form homes for a population of 10,000,000.

**Irrigation.**—To irrigate large sections of arid land, immense works are necessary, and private corporations had begun to attempt this as early as 1880. Most of the large ditches now in use were built by such corporations, many of the latter being bankrupted by the long period of waiting for profits. The individual farmers, however, flourished. Recently, the Federal Government has begun to participate actively in the reclamation of arid lands. The total amount of land under irrigation in the United States in 1908 was about 13,000,000 acres.<sup>2</sup> The National Commission reported that irrigation was possible on about 45,000,000 acres. California contains 10,000,000 acres, Montana and Wyoming 6,000,000 acres each, and Idaho 5,000,000 acres of irrigable land.

The Federal Government has passed three important laws for the encouragement of irrigation: (a) the desert land laws, (b) the Carey Act, and (c) the Reclamation Act. The original Desert Land Act was passed in 1877, and allowed entry on 640 acres of arid land, with the right to purchase at 25 cents per acre provided the entrant shall irrigate the land within three years. In 1891 the maximum amount of land was reduced to 320 acres, and it was further provided that an entrant must give proof that he has expended at least one dollar per acre per year for three years, before he can get title to the land. This Act was devised to encourage irrigation by individuals. It was poorly adapted for large-scale irrigation, and has led to some abuse.

The Carey Act of 1895 provides that the Federal Government shall grant to each of the arid States such areas of desert land, not to exceed 1,000,000 acres, "as the State may cause to be irrigated, reclaimed, occupied, and not less than 20 acres of each 160 acres irrigated by actual settlers," within 10 years from the passage of the Act.<sup>3</sup> In 1901 the time limit was extended. Further modification in 1908 granted to Wyoming and Idaho an additional

<sup>1</sup> *Rep. National Cons. Com.* I, 83 and III, 361 et seq.

<sup>2</sup> *Rep. Nat'l Cons. Com.* II, 67. The acreage in principal States was as follows:

Idaho . . . . .	2,670,000 acres
Colorado . . . . .	1,850,000 "
California . . . . .	1,800,000 "
Montana . . . . .	1,500,000 "
Wyoming . . . . .	1,000,000 "

<sup>3</sup> *Rep. Nat'l Cons. Com.* II, 79.

1,000,000 acres. The conditions of this Act have been accepted by the following States: Colorado, Idaho, Montana, Nevada, Oregon, Utah, Washington and Wyoming. Up to July 1, 1908, over 2,000,000 acres had been turned over to the States. When the States acquire land under this law, they enter into contracts with corporations to reclaim the lands. When the irrigation works are completed, the lands are sold to individual settlers by the State, the payments for water-rights being made by such individuals, to the company building the works. We thus have reclamation of arid lands through co-operation of the Federal Government, the States, corporations, and settlers. The law seems to be working well in that it encourages legitimate home-making.

**Reclamation Act of 1902.**—The most important step that the Government has taken was the passage of the law of June 17, 1902, under which the government itself undertakes the irrigation of lands still in the public domain. A special fund in the treasury is set aside out of the proceeds of sale of public lands, and is put in charge of the Secretary of the Interior, who makes surveys and examinations, and constructs projects of irrigation. He also operates such projects until charges for the water have been repaid,—whereupon the burden of operation and maintenance passes to the owners of the land. The irrigation projects of the government have been confined mainly to those enterprises which are too large, too costly, or too slow in producing returns to tempt private or corporate investment. A separate bureau of the Interior Department, called the Reclamation Service, has been organized to take charge of this work. It has already completed vast systems of irrigation and has others in course of construction; these contemplate the ultimate irrigation of 2,700,000 acres. It is estimated between 1902 and 1910, the total receipts from the sale of public lands for irrigation were about \$60,000,000, most of this having been expended in the reclamation of arid lands.<sup>1</sup> In 1910 Congress authorized an issue of \$20,000,000 of bonds to complete the existing irrigation plans.<sup>2</sup>

<sup>1</sup> Some of the most important irrigation projects of the government are the Salt River system with an area of 272,000 acres and a tunnel two miles long, and a dam 1,000 feet long and 284 feet high, the Uncompaghere project in Colorado with an area of 146,000 acres and the Gunnison tunnel 5½ miles long; other projects in Idaho covering 450,000 acres, and in South Dakota covering 100,000 acres.

<sup>2</sup> A comprehensive program of changes in Federal law was proposed by President Taft in his special message on Conservation to Congress on January 15, 1910:

1. The revision of the public land laws to correct abuses, and to make them available only for the bona fide settler.
2. The validation by Act of Congress of the withdrawal from public entry of public lands containing water power sites.
3. The careful classification of public lands.
4. The separation of mining rights from the title to the surface land; the surface land to be disposed of under the general land laws, but the minerals to be disposed of only by lease or royalty.

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## QUESTIONS

1. Why do we need a national policy of conservation?
  2. How has the relative cost of labor and raw materials delayed this policy?
  3. Would you favor leaving the whole matter of conservation to individuals and corporations or to the national and State governments and why?
  4. Explain the historical origin of our present conservation movement.
  5. Outline the special need of forestry regulation.
  6. What has Congress provided on this subject?
  7. What has the President done?
  8. What have the States done? Summarize the Pennsylvania Forest Land and Timber Tax.
  9. Summarize the organization of the forest service and explain its work.
  10. How are the national forests protected from fire?
  11. Give your impressions of the possibilities and needs of forest planting.
  12. How would you show the need of government conservation of mineral resources?
  13. How does the present Federal law regulate the private acquisition of mineral lands in the public domain?
  14. Explain the proposals for further legislation.
  15. Ought the government to give away or sell at a nominal price valuable ore and mineral lands and thereby encourage their quick development by a few large corporations or should it attempt to secure their development by leasing them for limited terms of years? Reasons.
  16. Why is our public land policy of importance to the people?
  17. What was the original land policy?
  18. Explain the homestead law.
  19. What are its practical defects?
  20. How are forest lands acquired under the Timber and Stone Act?
  21. Contrast the present with the past land policy of the government.
  22. Explain the most important proposals for future legislation by the Conservation Commission.
  23. What is the practical importance of a public water conservation policy?
  24. How and why has water power increased in value in recent years?
  25. How are water-power sites conserved by the Act of 1910?
  26. Explain the chief proposals for additional laws on this subject.
  27. What is meant by reclamation?
5. The renting of water power sites on a lease for not longer than 50 years with provisions for the development of such rented sites, and against their monopolization.
  6. The continuation of the extremely important work of the Department of Agriculture in its study of soils.
  7. The issue of \$30,000,000 of bonds for the purpose of finishing the irrigation projects now under way.
  8. An annual appropriation for the re-forestation of the sources of certain navigable streams, to preserve the regular flow of water.
  9. The improvement of the Ohio River and the Upper Mississippi and ultimately of the lower Mississippi. Also the carrying out of a general scheme of waterway development.

28. Explain the practical value of irrigation to the western farmer and show the extent of the need.
29. Summarize the provisions of the Carey Act.
30. The reclamation act of 1902.
31. Give some examples of what the government has done under the latter act.
32. Explain the chief features of President Taft's conservation message of 1910.
33. Prepare an essay on National Conservation of Natural Resources showing what the government itself is doing and what it could profitably do.
34. Prepare a report on the forestry and other conservation laws of your State.

## CHAPTER XV

### THE FEDERAL JUDICIARY

**THERE** is no feature of the American government which has been so generally admired abroad nor which is now undergoing such drastic criticism at home, as the Federal judiciary. The unusual power possessed by our courts, of declaring a State or National law void when it is contrary to the Constitution, has brought the judge into a much more prominent position in this country than elsewhere and has set him above both legislator and executive. But with this high prominence has come an unexpected and undesired responsibility, that of defeating the legislative will,—an exercise of power which necessarily calls down upon the courts the highest praise and the most violent denunciation from different circles of the people. The strong influence of court decisions upon business and labor conditions is becoming more apparent and public attention is being attracted to the courts in a way that must increase their efficiency and usefulness. We shall examine briefly:

1. Why we have separate Federal Courts.
2. Their present organization.
3. Their practical operation and influence.

**Reasons for Separate Federal Courts.**—The Constitution of 1787 established a national system of law which was to be uniform throughout the United States. In order that the interpretation of this law by the courts should be maintained on the same level in all parts of the country, a Federal court system was necessary. Observers of our State governments are often surprised by the lack of uniformity and differences of opinion between the courts of different States in the enforcement of the same legal principles. Such a danger could not be permitted in the Federal legislation. Second, not only must the interpretation of the national law be uniform, but it must also be impartial. If the Federal law were left to the State courts to interpret, these might favor their own citizens at the expense of those of other States or of the foreigner. Third, there were problems of State control of lands; there were questions in dispute between the State governments themselves and fourth, there was also the possibility that the State courts might enforce the national laws in such a sense as to rob Congress of its intended powers. We can hardly imagine a State court giving those broad statesmanlike national views of the powers of Congress, which are contained in John Marshall's Supreme Court opinions nor could we expect that when the State and National powers came into conflict the State judges would support



any views of National progress that would limit the State sovereignty.

For these reasons a separate Federal judiciary was established, a plan that has proven highly successful in all of the points above described. As a general rule, the personnel of the Federal courts is superior to those of the States both in legal knowledge and in the ability to handle large legal and constitutional questions in a large way. Not only have they established the desired uniformity of Federal law but under the stimulus of the Supreme Court they have helped and guided in the growth of the National powers and established the National sovereignty on a secure footing over that of the States. At the same time they have played an indispensable part in preserving and protecting the Constitution.

**The People's Interest in the Constitution.**—Important as is the duty of interpreting the national law with uniformity, the greatest service of the national courts is the protection and development of the Constitution. There is no government question to-day which is so little understood as the development of the Constitution by the courts. It is to the interest of every man, woman and child in the country that the Constitution should grow in order to insure a *steady, continuous* progress of our business and social conditions. This progress is a never-ending duel, in the political arena, between radicalism and conservatism. If either side completely vanquishes the other through a long series of years, the progress of the country is not steady, but suffers either a reaction or a severe prostration. The radicals always fasten their attention on human rights and point out how these rights are being violated under the existing system; but the radicals cannot be trusted with permanent control because they gradually press their doctrines to impracticable extremes and fall under the influence of wild, unbalanced leadership. Nor are the conservatives any more trustworthy, since their thought is but little occupied with unequal human rights or grievances. Their aim is to protect the strong and to preserve what is, while their leaders, though more able, are too often "controlled."

The normal, healthy business and social progress of the nation cannot be secured by the overwhelming and long-continued victory of either of such forces; it must come through the gradual working out of a feasible compromise in the system and policy of the government. How shall this compromise proceed with some steadiness and continuity? We must have some machinery which will prevent too sudden or sweeping a change by the radicals or too violent a reaction by the conservatives. This machinery is the Federal judiciary.

The Constitution is replete with safeguards against extreme radicalism,<sup>1</sup> the court must either defend and uphold these bul-

<sup>1</sup> See the practical illustrations of this whole thought in the Chapters on the Constitutional Protections of Business, the Police Power, and the Powers of Congress.

works of conservatism or see the national progress confounded by the ill-considered whim of a momentary majority. The Constitution grants progressive powers, the court must either interpret these in the broad, free, advancing spirit of statesmanship or make the Constitution not an instrument of life but a cause of paralysis. It is as much the judicial duty to find new and broader meanings for the words of the Constitution, thereby strengthening and applying its spirit in a progressive way to new conditions, as it is to check the legislative in any attempt to override or destroy the fundamental law. It is in this task of protecting the Constitution from both extremes and thereby preserving the even pace of progress, that the American judiciary fulfills its highest duty.

"A Constitution," says Governor Baldwin, "is the garment which a nation wears. Whether written or unwritten, it must grow with its growth." He aptly quotes Mr. Bryce, "Human affairs being what they are, there must be a loophole for expansion or extension in some part of every scheme of government; and if the Constitution is Rigid, Flexibility must be supplied from the minds of the Judges."<sup>1</sup>

Justice Holmes of the Supreme Court has well expressed the duty of the Judge in interpreting the Constitution,—“But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic, living institutions transplanted from English soil. Their significance is vital, not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.” *Gompers v. U. S.*, 233 U. S. 604; 1914. And even in cases involving no constitutional point, the courts must show statesmanship of a high order. What is the meaning of the words “combination in restraint of trade” as used in the Sherman Act? The Court’s answer to this question determines whether the immense legal machinery of the Government shall be directed against all forms of combination, good and bad alike, and the most effective and useful methods of conducting business thereby hindered and destroyed, or whether on the other hand, the Court shall make more clear and definite the real meaning of the legislator and distinguish between those combines which are predatory and those which are natural and healthful in their tendency.

The constitutional question “what is commerce?” as we have seen in the chapter on the “Powers of Congress,” is one which the Court may answer in such a way as to extend the control of Congress over a great part of the business of the country or to destroy that control completely, and leave business subject to the 48 State legislatures. Even in the problem,—what is a “reasonable and just” railway rate?—the Court’s answer may give a large profit to the carrier or may cut that profit in half or destroy it altogether and thereby increase or diminish the value of railway property

<sup>1</sup> S. E. Baldwin, *The American Judiciary*, page 84.

by hundreds of millions of dollars. What is railway "discrimination?" Upon the Court's reply may hang the chances for immense wealth for some interests and the smothering of others, the immediate and rapid rise of whole communities and districts and the slow decay of others;—cities may grow or decline accordingly as the judiciary interprets the long and short haul clause of a commerce law to mean one thing or another.

When is a drug "misbranded" or falsely labelled? If the Court declares, as we have seen that it did, that misbranding is a misstatement as to the ingredients actually used in a drug compound, then the consumer is only protected against fraud in ingredients; if the Court decides, as it did, that "misbranding" does not include false and deliberate misstatement on the label as to the curative powers of the drug, the patent medicine fraud continues unabated until Congress is forced to make its intention emphatically clear by the Shirley Amendment.

**Early Enlargement of the National Powers by the Court.**—Mention has already been made of the court's great influence in establishing the power and authority of the National Government upon a secure footing, early in its history. The patriotic foresight of this policy can only be appreciated by those who understand the centrifugal forces which were at work to disrupt the new government and the vital importance of firmly entrenching the national authorities in the respect and loyalty of the people. A weak National Government in the first twenty years following 1789 would have inevitably meant the rapid disintegration of the union and its annexation by foreign powers. It was the work of the Court to rehabilitate the nation legally and to express in law that dream of union which the constructive genius of the great Federalist statesmen had revealed to the people. The Court did this by giving to the national authority the benefit of every doubt in the interpretation of the Constitution. No provision in the document had been made for the acquisition of new territory. Yet without this power, we could not enlarge our boundaries nor acquire Louisiana, which opened up the interior and made us a continental power. Justice Marshall declared that the Constitution confers the necessary authority in the powers of making war and concluding treaties.

Does the Constitution protect charters of corporations against State action? Again the Chief Justice sought to establish national supremacy by accepting Webster's claim that the charter was a contract, and as such, subject to the protection of the Constitution, Article 1, Section 10, providing that no State should make any law violating the obligation of contracts. Could a State tax the notes of the United States bank? Here the supremacy of the Federal Government, when questioned, is firmly asserted by the Supreme Court and the general principle established that the agencies of national power are exempt from State interference, whether by taxation or otherwise. In all of these and countless other decisions

the Court showed its power and willingness to vitalize the authority of the new union and to protect it from those disintegrating influences which we now see were all the more insidious for being masked under the patriotic title of "State's Rights."

Is the Federal or the State power supreme in matters relating to national trade and taxation? Here again Chief Justice Marshall, by his decision in *Brown v. Maryland*, 12 Wheaton, 419; 1827, re-asserts the control of the National Government and its freedom from State interference in regulative matters. The State was forbidden to tax national commerce, because such a levy would hinder and destroy the exercise of the national power of regulation. Does the word "commerce" as used in the Constitution, include only the goods which pass from State to State in trade? If so, the power of Congress to regulate interstate commerce is limited to the control of these goods. Once more, Chief Justice Marshall, in the *Brig Wilson v. U. S.* extends and fortifies the national authority by holding that commerce includes navigation and vessels as well as the goods carried. Our present laws for the protection and safety of shipping are based on this broad statesmanlike rule.

These few instances show not only the immense scope of the Federal judicial powers and their close, intimate relation to business development but especially the Court's highest duty as a steadying factor in the progress of the nation. This influence like a great fly-wheel takes up the momentum of the government policy and carries it over the dead centers of the machine while it also catches the whims and spurts of power and steadies them to a more constant pace. The result is progress.

**Present Organization.**—The first Judiciary Act was passed in 1789, followed by a number of later laws all of which were revised and codified by the general Act of March 3, 1911. This provides for the following organization: The Supreme Court, with a Chief Justice and eight Associate Justices, any six of whom constitute a quorum. The Chief Justice is paid \$15,000 annually, the other justices \$14,500. A marshal, a clerk, deputies, reporters, etc., are appointed by the Court. The Supreme Court has been the idol of the American legal fraternity and has been copied by foreign countries in establishing Federal forms of government. Its prestige and high standing have come largely from that spirit of statesmanship which we have seen is especially required in the American court system. Its jurisdiction includes "original" cases, being those which may be brought immediately before it in first instance, such as cases affecting ambassadors of foreign powers, cases in which a State is a party,<sup>1</sup> and the "appellate," making up the

<sup>1</sup> *The Eleventh Amendment.*—Article 3 of the Constitution provides that the Federal Judicial Power shall extend "to controversies between a State and citizens of another State." The State of Georgia was sued for non-payment of a debt under the above clause, and the State attorney urged in defence that the State could not be sued without its consent. The case coming to the Supreme Court, that tribunal decided against the State in favor of the private creditor.

larger proportion of its duties, and including appeals and reviews brought to it from the Courts below. The nine Circuit Courts of Appeals each consist of three judges with a salary of \$7,000. Those tribunals were established in 1891 to relieve the Supreme Court of its burden of business by hearing appeals from the lower courts. At the time the change was made cases remained on the docket for three years before they could be argued. The judgment of these Appeal Courts is final except in a narrow range of cases, but they may certify any important disputed point to the Supreme Court for decision, or the latter may on application review the opinion of the Court of Appeals.

**District Courts.**—The area of the United States and Alaska, Hawaii and Porto Rico is divided into 83 judicial districts with a district judge in each and in certain districts two or three judges, each with a salary of \$6,000 yearly. The court officers of each District Court are appointed by the Court. All the jurisdiction which was formerly held by the Circuit Courts, now abolished, has been transferred to the District Courts, which makes them tribunals of first instance in Federal cases. The Judge in each district appoints a commissioner who acts as a sort of justice of the peace in criminal cases.

The United States Court of Claims consists of five judges with a salary of \$6,000 except the chief justice who receives \$6,500. The court sits at Washington and considers all civil claims against the United States. A lump sum is annually appropriated by Congress to pay the judgments awarded against the Treasury by this Court. This formality is necessary because the Constitution, Article 1, Section 9, declares that, "No money shall be drawn from the treasury but in consequence of appropriations made by law."

The Court of Customs Appeals is composed of a presiding judge and four associates receiving a salary of \$7,000 yearly. The Court sits in any of the judicial circuits and has exclusive jurisdiction over appeals from the Board of General Appraisers of the Treasury Department as to the value of imported goods and the rate of duty imposed thereon.

The Commerce Court consisted of five judges assigned by the chief justice of the United States from among the circuit judges for a period of five years. Its jurisdiction included appeals from the rulings of the Interstate Commerce Commission and cases brought for the enforcement of the orders of the Commission. It was abolished in 1913.

The judges in all the Federal courts are appointed by the President with the advice and consent of the Senate, and serve during good behavior. In the territories and dependencies there are courts (*Chisholm v. Georgia*, 2 Dallas, 419; 1793.) The States' Rights Party which was strong in our early history secured the adoption of the 11th Amendment which prevents suits from being brought in the Federal Courts against any State by the citizens of another State or by foreigners. All of the States have made provision by which such suits may be brought in their own courts.

created by special acts of Congress; these bodies are not a part of "the judicial power of the United States" as provided by Article 3 of the Constitution, neither do the detailed provisions of that Article apply to them, such for example as the tenure of judges during good behavior, etc.; their authority comes from the power of Congress to govern the territories and Congress can and has organized and abolished them at will, limiting their terms of office and providing for appeals from them to the regular Federal courts or not, as it pleased.

The Supreme Court, being established by the Constitution, cannot be abolished by Congress, although the number of its members may be increased, and upon vacancies occurring, its membership may be reduced. The inferior courts, while provided for in a general way by the Constitution are largely the creatures of Congress. They may be reorganized, new courts created, or a whole class of courts discontinued, as was done with the Circuit Courts and the Commerce Court in 1913. Probably it would be unconstitutional for Congress to abolish all the inferior courts, since this would deprive the people of the original jurisdiction of these lower courts, which the Constitution intended they should enjoy.

**Jurisdiction of the Courts.**—In fixing the jurisdiction of the Federal courts the Constitution prescribes that this shall consist of:

All cases arising under the Constitution itself.

Under Federal laws and treaties.

Cases affecting ambassadors, consuls, etc.

Cases of admiralty and maritime jurisdiction.

Those in which the United States is a party.

Controversies between States.

Between citizens of different States.

Commenced by a State against the citizens of another State.

Between citizens of the same State under land grants from different States.

Between American citizens and foreign States, citizens or subjects.<sup>1</sup>

A second glance over this list of controversies shows that they include all the cases in which State partiality or bias might influence the decision if it were left to the State courts. It also includes those subjects which require the greatest uniformity in decision in all parts of the country.

Cases come into the Federal courts either by being started in the District Courts where a question of Federal law is concerned or because of the difference in citizenship of the parties, or by originating in the State courts, under the State law, and being carried from the Supreme Court of the State to the Federal Supreme Court on the ground that the State law conflicts with a Federal act or the Federal Constitution. For example, the Minnesota rate

<sup>1</sup> In cases affecting ambassadors, public ministers and consuls, and cases in which a State is a party, the Supreme Court has original jurisdiction.

cases<sup>1</sup> arose under a State law and the action of the Minnesota railway commission in lowering freight charges pursuant to that law. The railway companies concerned claimed that the State law was in conflict with the Federal Commerce Act and, after taking their case to the Supreme Court of the State, which decided against them, they appealed to the United States Supreme Court, which decided that the State law was valid until Congress or the Interstate Commerce Commission should make use of its regulative power.

**The Supreme Law.**—The Constitution in Article 6, Clause 2 defines the order of precedence of the law as follows:

“This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.”

**The Decision of Constitutional Points.**—In passing upon the constitutionality of any act, State or Federal, the courts observe certain guiding principles, chief of which are the following:<sup>2</sup>

Any court may be called upon to decide the question of constitutionality, from the Supreme Court of the United States down to the Justice of the Peace in a country village. Whenever brought to its attention in such a way that the case must be said to turn upon the constitutionality of a given law or ordinance, such a court may properly decide the point.

Nevertheless in all cases the court will avoid the point of constitutionality unless it is necessary to decide it; if the case can properly be determined upon some other grounds such a course will be followed. This policy is a natural one because the judges do not wish to go out of their way to attack the validity of a statute. Accordingly, if they find that the court has no jurisdiction in the case or that the law does not apply to the conditions before them, or if they have other reasons for making a decision without invalidating an existing statute, they will take advantage of the other grounds for their decision.

Those whose rights are not involved or affected by an act cannot ask the court to invalidate it. The law stands until some one whose rights are immediately concerned questions its validity.

Not every law which is unwise or unjust is necessarily unconstitutional. We often hear that a law is invalid because it is taxation without representation or because it is unfair or inexpedient or wasteful, but none of these defects renders the act unconstitutional unless it conflicts with the letter or spirit of some part of the Constitution.

<sup>1</sup> *Simpson v. Shepard*, 231 U. S. 352; 1913.

<sup>2</sup> These maxims are admirably set forth in *Cooley, Principles of Constitutional Law*, page 164.

If an act is constitutional in one part and unconstitutional in another the courts will declare invalid only that part which conflicts with the fundamental law and will allow the rest to stand if possible. This is not possible where the remnant which is allowed to stand would be so far from the legislative intent and purpose as to be a clear violation of the will of the lawmakers. For example, the income tax of 1894 contained certain provisions which were valid and others which conflicted with the Constitution, but the Supreme Court concluded that if it allowed the valid parts to remain, the will of Congress would be entirely defeated and a grotesque tax law of which Congress would utterly disapprove would result. For this reason it declared the entire act unconstitutional.<sup>1</sup>

The presumption is always in favor of the validity of an act, a mere doubt or possibility of conflict with the Constitution is not sufficient. The benefit of the doubt will always be given to the legislator. If any reasonable construction harmonious with the apparent purpose of the legislature can be found which will render the intent of the act constitutional, such construction will be adopted by the court.

As a general rule the courts will not impute illegal motives to the legislative authority; an unconstitutional purpose in legislation, in order to be so decided, must appear clearly upon the face of the act or from its terms.<sup>2</sup>

**Federal Interpretation of State Laws.**—Although the Supreme Court exercises the fullest freedom in passing on the constitutionality of a State act, it accepts without question the decisions of the State Supreme Courts as to the meaning of State laws and their conformity to State constitutions. It will not question their decision on these points because it is not an interpreter of State laws nor of State constitutions further than their harmony with the National law. If it did not observe this rule it would immediately be plunged into an endless maze of purely local questions which would soon overburden the Court and lead it far from its original purpose and object. In *Chicago, Milwaukee and St. Paul Railroad Company v. Iowa*, 233 U. S. 334, 1914, a question arose as to the exact powers of the Iowa Railroad Commission. The company, objecting to a ruling of that body, claimed that the Commission had no power to issue the order in question, to which the Court replied, "But the obvious answer is that what is required by the law of Iowa has been determined by the supreme court of that State. That court, examining the various provisions of the Iowa Code which have relation to the matter, has held that the order was within the authority of the Railroad Commission." A long line of decisions has established this principle. Of the many

<sup>1</sup> *Pollock v. The Farmers Loan*, 158 U. S. 601; 1895.

<sup>2</sup> See also the discussion of these rules in Story, *Commentaries on the Constitution*, sections 399 and ff.



questions which arise between citizens of different States and in which the Federal District Courts under the Constitution have jurisdiction, the large majority are matters of State law. In all of these the District Courts follow the interpretation of the State supreme tribunals as a matter of course.

**Execution of Court Judgments.**—The decrees and decisions of the Federal District Courts are executed, if necessary, by the marshal of the district. If he is opposed by force application may be made for Federal troops to carry out the court decision, although such a contingency never occurs, because of the general respect for Federal tribunals. The refusal to obey a court order in an equity case differs from that in an ordinary law case in that equity writs are usually commands to perform or not to perform a certain act; disobedience is contempt of court and leads to the immediate arrest and fine or imprisonment of the offender.

**Advisory Opinions.**—The Federal courts do not give opinions on the constitutionality of any bill or any other question until the case actually comes before them in which the rights of interested parties are concerned. Washington, in his first administration, asked the advice of the Supreme Court as to the rights and duties of the United States under certain of its treaties and under international law, but the Court answered that it could not give a decision until the case came before it. The courts of most of the States follow the same rule, except that of Massachusetts which is sometimes consulted by the governor or the legislature when a new measure of doubtful constitutionality is about to be passed. The reason given for the rule against advisory opinions is that the courts are not administrative, political or advisory bodies in any sense of the word. Their duty is to uphold the Constitution and the laws by applying them to actual cases. Any extension of this power to include the giving of advice to the legislator or the executive, it is feared, might bring the courts into political agitation and undesirable partisanship. While there may be some force in this view the advantages of such a court opinion would far outweigh its dangers. It must be remembered that the courts would not be called on to *advise* as to the expediency or wisdom of a proposed law but only to *inform* as to its validity. How much uncertainty, loss of time, money and energy might be saved to the community if the doubtful point of constitutionality could be cleared up before the passage of a bill instead 3 or 5 years later! The real objection of greatest weight would be the burdening of the courts and the necessarily short time in which they would have to render their advisory opinions. The Court of Claims may be consulted by a department head, as to the validity of a department debt, and the Supreme Court of the State of Washington may be consulted by the Secretary of State as to the constitutionality of an Initiative proposal which is about to be submitted to the people.

**The Judicial Power to Declare Laws Unconstitutional.**—There

is no doubt that lawyers originally were divided on the question whether the acts of Congress could be declared invalid by the courts. Some of the Constitution framers believed that the courts had such a power, and the reason for this belief is both strong and clear. In the minds of many of the framers, the new government that was being formed, was based on an *agreement* between the States, and if it exceeded its powers under the agreement it might usurp those of the States. They felt the need of some authentic interpretation of the agreement which would uphold those laws properly passed and declare invalid those which exceeded the agreement. Naturally the courts, being the only proper authority to interpret the laws, must measure each law by the Constitution and declare void and of no effect every measure which transcended the proper powers of the new government. Before 1789 several of the State courts had revised or annulled legislative acts which they considered contrary to the State constitution, and had pointed the way for similar action by the national Supreme Court. In *Holmes v. Walton*, decided 1780, the Supreme Court of New Jersey held invalid an act passed by the legislature during the Revolution, which provided that goods of the enemy might be seized and confiscated after trial by jury. The Court apparently considered that a jury of six men was not a jury as commonly understood in the colony up to that time. Upon an attempt being made by petition to the Assembly to have the legislature overthrow the action of the Court, the Assembly passed a law ratifying the Court's action and declaring that the judges on demand of either party should grant a jury of twelve men. This precedent must not be over-estimated in importance but it is apparently a clear annulment by the Court of a legislative act on the ground of unconstitutionality. Later cases in other States established the principle more completely. In the National Government it was confirmed by Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch, 137. President Adams, in the last hours of his administration, had appointed several local justices of the peace in the District of Columbia, among them William Marbury, but the new Secretary of State, Madison, under the incoming administration of Thomas Jefferson, refused to turn over the official commissions of the justices of the peace, holding that Adams had made the appointments at the last moment in order to perpetuate the power of his friends in office. The appointments had been confirmed and the commissions signed and sealed and in the possession of the Secretary of State. The constitutional question was:—Could the Justices demand from the Secretary of State their commissions and was he bound to deliver them? Marbury asked the Supreme Court to issue a writ of mandamus to the Secretary ordering him to deliver the commission. The Judiciary Act of 1789 authorized the Supreme Court to grant a mandamus and the Court held that *under the law* the appointment was legal and Marbury was clearly entitled to the writ,—but was the law in

accordance with the Constitution? A close examination showed that the Constitution gave the Supreme Court *appellate* jurisdiction in the case whereas the writ of mandamus could be used only in *original* jurisdiction. The question was squarely presented then,—could the Court make use of a part of original jurisdiction in a case which the Constitution classed as appellate? To this Marshall answered that the Constitution was supreme and the law must be regarded as of no effect in so far as it violated the Constitution. “The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is now law; if the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void. This theory is essentially attached to a written constitution, and is, consequently, to be considered by this court as one of the fundamental principles of our society. . . . It is emphatically the province and duty of the judicial department to say what the law is. . . . If two laws conflict with each other, the courts must decide on the operation of each.” From this momentous decision down to the present time the power of all our courts, both National and State, to declare invalid a law conflicting with the Constitution, has never been successfully disputed. The various movements which are now on foot to limit this authority are based on the thought that it has been honestly used, but in such a narrow way as to block the enactment of urgently needed legislation.

In the view of Professor Charles G. Haines<sup>1</sup> our attitude towards the Courts and towards their control of legislation is largely determined by our general views of government,—if we believe in the theory of checks and balances, to protect property rights and the interests of minorities at whatever cost, we shall uphold judicial control of legislation; but if we lend our support to the principle of “popular rule” espoused by the more advanced factions and parties in national politics, we shall uphold rather the principle of legislative and executive supremacy, and favor some means of limiting the judicial veto.<sup>2</sup> The mildest of these is the provision of the

<sup>1</sup> *The American Doctrine of Judicial Supremacy*, Macmillan, 1914.

<sup>2</sup> Not a little of the popular hostility to the courts is caused by legislative cowardice for which the judiciary is in no sense responsible. Both Congress and the State legislatures frequently pass laws that are either unconstitutional or unclear knowing that the odium of declaring them illegal or of defining their real meaning will fall not upon their authors but upon their interpreters. This is now so frequently done as to be a recognized legislative custom.

Ohio Constitution of 1912 that decisions holding a State law unconstitutional must be concurred in by six of the seven judges of the State Supreme Court. The more radical proposals are the recall of judges and the recall of judicial decisions, described in the Chapter on Direct Legislation.

**Practical Operation of the Federal Judiciary System.**—Our American courts are passing through an era of searching criticism; the trust promoter, and the radical labor leader, alike, are dissatisfied with judicial rulings. It is also complained that the judges' decisions lag too far behind public opinion, a strong current of popular sentiment is demanding a cheaper, quicker and simpler method of procedure, and there are sporadic proposals for a recall which shall place it in the power of the people by majority vote to oust from office any judge or other official at any time. The judicial system is about to undergo a revision and reorganization in order that it may reflect more accurately and helpfully the business and social development of our period. The more important criticisms of our system may be divided into two general classes; first, that the judicial process is so slow and costly as to be a luxury for the rich. There is much truth in this charge and it applies not only to the Federal courts but to those of the States as well. England and the Continental countries have far surpassed us in the admirable simplicity of their court procedure. A few simple examples may suffice to point the need for a change in the American system. An unimportant civil case involving an action for enforcement of a contract or for damages in case of a broken contract usually requires from one to two years for its decision in the lowest court of most large American cities. It may then be appealed to an intermediate court in the State and another decision had in a year to a year and a half. It may then proceed to the Supreme Court of the State if the amount involved is sufficiently large and may there be decided in from one to two years time, making a total period of from three to six years from the start of the suit to its final decision.

If it be a Federal case brought in the United States District Court in the first place the time required for the first decision may not exceed six months although it may go much higher, the opportunities for continuance upon the request of either side being enormous and readily granted by the judges. If then appealed to the Circuit Court of Appeals another year or even two may be required, and if the case may under the Federal law be taken to the Supreme Court it would there rest upon the docket in the ordinary course of events for two years or perhaps three before a final decision was had. This calculation makes no allowance for mistakes on the part of the attorneys in pleading or in the manner of bringing suit. Such mistakes are naturally quite common and therefore should be added to the total amount of time required in reaching a decision. For these reasons a citizen whose rights are injured and who appeals to the Federal courts is fortunate if his case reaches a final decision within

they would gain inestimably by paying the necessary establishment of additional tribunals, and by a uniformization of the rules of pleading and procedure to the same ends of causing delay.

**Proposed Changes in the Supreme Court.**—Since delay occurs at the top of the system, it has been suggested that the Supreme Court might readily be reorganized along the lines of foreign courts of appeal by dividing it into sections, each section having the decision of cases in a particular branch of law, such as criminal appeals, admiralty law, constitutional rights, administrative law, etc. If our Courts were reorganized in this manner the number of judges increased accordingly there would be no delay but that litigants would receive a much more expeditious form of justice than at present, and in addition they would be able to obtain a decision based on better legal and business principles than at the present time. The reason is simple, under the present system the Supreme Court must familiarize itself with every branch of the law, even in minute details. This is practically an impossibility. If for example the important questions growing out of the interstate commerce clause of the Constitution could be decided by a section of the Court through a section on interstate commerce law, the opportunity for specialization in commercial problems would be afforded. This section to handle such cases in a minimum of delay would be so interpreted would be not only more expeditiously pronounced but it might be better law. Serious objections have been made to this proposal on the ground that it destroys the uniformity of interpretation of the law which was one of the chief reasons for the establishment of the Supreme Court. It is claimed that if the Court were divided up into sections, each section would

and it may be hoped that the business community may soon enjoy the advantages which such a reorganization would insure.

Our Federal procedure would be greatly hastened also by the appointment of more judges in the districts. In some of the jurisdictions the docket is so overburdened that cases cannot be called for a year after they are filed. A material increase in the number of judges would at once remedy this difficulty. The abuse of "continuances" is also a serious block to quick procedure. For these both the attorneys and the courts are responsible. It is now customary even in the Federal courts for the judge to grant one and often two continuances or postponements on the application of either side, without serious question. The attorneys, knowing this, make use of it not only to enable them to conduct their cases elsewhere, but also to delay and harass the opposing party. A successful attorney with a large practice is sometimes obliged to ask for postponement because of conflicting court dates, but a more careful examination into these postponements and a flat refusal of the courts to allow a continuance beyond a certain reasonable period would remove the most serious cause of the loss of time.

**A Simpler Court Procedure.**—In the second place, lawyers and laymen alike agree that the procedure in most of our courts is needlessly complicated, and inordinately time-consuming. President Taft from his judicial experience was well acquainted with these weaknesses and made it his special effort to remedy them. Pursuant to his suggestion, a committee of the Supreme Court was appointed which revised and simplified the entire method of pleading and conducting equity suits in all the Federal courts; a similar revision is contemplated for the ordinary *law* cases. Most of the needless complexity in the starting of suits and in the nature of the exact pleas to be entered has descended to us from English procedure of two hundred years ago—while in the land of its origin, this same procedure has long been abandoned for simpler, more convenient forms. In this respect our Federal courts are far more advanced than those of the States. A commission appointed several years ago by the Pennsylvania Supreme Court to investigate legal procedure reported that over 50% of the recent cases in the courts of that State had been decided on *points of practice* that is, on questions of form in the methods of bringing suit. The tendency to seize on trivial detail or minute discrepancies in statement or form has been allowed to run riot through our procedure with appalling cost to the community and to the popular respect for the courts. Under the continued stimulus of Mr. Taft and with the co-operation of the American Bar Association strong efforts are now being made to divest procedure of its unnecessary formalities and delays. Nothing could be done which would so effectually rehabilitate the judicial system in the trust of the people. In the last analysis we do not measure the value of our tribunals by the method of their choice, whether appointed or elected, nor by their qualifications, nor their salaries, nor by the

recall, nor even alone by their erudition and knowledge of the law,—rather do we believe “by their fruits ye shall know them.” If the courts can give us broad, statesmanlike interpretation of the law through a quick, simple and cheap method of procedure, it matters not whether they are appointed nor whether we can recall them or their decisions. And if on the other hand we adopt every modern device to make them sympathetic with the popular will but allow the technicalities of a by-gone age to remain, encumbering their machinery, their real work is not done.

A third and more serious criticism of our court system is that it protects the powerful against the weak, and is largely a means of maintaining and fortifying the interests of the conservative classes exclusively. This criticism while untrue in many cases has sufficient basis to require examination. The legal training of the judge from the time he starts out as a practicing lawyer is such as to attract his attention to the sacredness of property; his mind is chiefly occupied with the means of upholding property rights. In examining the historical reasons for our existing law, he is inclined to look upon the past with much greater care than upon the natural growth of the law. As a result his whole professional education makes him intensely conservative unless by temperament his natural instinct favors progressive changes. He believes that ignorance, poverty, crime, and industrial inefficiency are largely the result of willful neglect of their own interests on the part of those concerned, and he feels that “those concerned” are the pauper, the criminal and the loafer. A profession whose members are trained by long environment to this view of life must naturally tend to sympathize with what is, rather than to seek new interpretations of the law in the interest of less influential classes of the people.

It is no criticism of the judge to say that his education has molded his habit of mind, since the same is true of any other professional or business class, yet the fact is a serious weakness in our judicial system, and has created a strong feeling on the part of the lower classes that the judiciary is under the influence of those who also control the greatest property interests. Such a control if it exists is not the result of a deeply laid plot or scheme but rather of this psychological fact of natural reaction against change, caused by the environment and training of the judge's mind. This conservative bias must be changed, not by a change in the appointing power, not by a recall, nor by any other device which may threaten the independence of the judges, but rather by a change in the method of training men for the bar. Since the judge is first a lawyer, it is the education of the lawyer which must be made to include a knowledge of the causes and nature of social and economic growth. If our law is to be progressive it must be interpreted by men trained to see the necessity of legal growth and life. Here again some foreign systems have developed more rapidly than our own. The German government educates its judges with care, giving them a

thorough course of training in legal, social and economic affairs. If the members of our courts in this country were so educated there would be little reason for complaint of class partiality.

There is no doubt that these complaints have been much overdrawn. The radical agitator is not the only critic of the bias of the Federal courts; the market manipulator who may have schemes of stock jobbing which are interfered with by the decisions of the courts also complains bitterly of the judge's influence in unsettling "conservative business interests." The importance of these criticisms from the two opposite extremes of the business world must be duly discounted. If our judicial system were simplified, our court procedure curtailed and expedited, and the legal training of the attorney were made more social in character we should have a national judiciary second to none.

**The Injunction.**—The demand of the labor organizations for a change in the law governing injunctions is due to certain abuses in the granting of this writ which have crept into our court practice in the last few decades. An injunction is a command or order issued by a court, requiring or forbidding certain persons to perform certain acts. The purpose of the writ or order is to prevent irreparable damage to property or to the public welfare. The court upon being convinced that a grave danger of this damage exists, instead of waiting until the damage has occurred and then punishing the culprit—a course that would uphold the law but would not save the public or the property owner from injury,—prefers rather to intervene before the evil is wrought and by saying to the wrong-doer, "Thou shalt not," bring him to a sober sense of what he is about to do and remove all doubts as to his legal responsibility if he persists. The idea is a practical one and has been applied most frequently and successfully in other fields outside the realm of labor controversies.<sup>1</sup> But in labor questions many of the courts, being ultra-solicitous to protect property rights, have allowed themselves to be led into an extreme use of the writ and have thereby brought on a reaction which threatens seriously to curtail its usefulness. The excessive granting of restraining orders and injunctions is complained of because it is claimed (a) they are issued too hastily without hearing both sides; (b) they do not describe accurately and fully the precise acts forbidden; (c) when so used as a weapon by the employer and violated by the worker the latter is subject to fine and imprisonment without a jury trial.

(a) The hasty issue of restraining orders, or temporary injunctions is especially objected to in that it prevents the persons restrained from presenting their side of the controversy before the order is issued. A judge may be applied to even at his home, by the attorney for one side, with a sworn statement that immediate

<sup>1</sup> Most of the injunctions issued by the courts are in no way connected with labor questions.



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The defendant has nevertheless suffered  
vantage and has at least been placed under a s  
unjustly prejudiced his side in the controversy.  
friends of the present system, "it is no injustice t  
not to do an illegal thing. The courts do not er  
from doing what he has a right to do." Unfortun  
frequently do so, however, and it is this that giv  
second objection.

(b) The vagueness and inaccuracy of many res  
makes them far more sweeping and drastic than tl  
and on appeal they must frequently be modified and  
the law. But they are not changed until months a  
originally issued, and in the meanwhile every pers  
them is under the severe restraint of an illegal cour  
falls with special weight upon workmen in a labor c  
matter how just or unjust may be their cause, and  
gravated by the "blanket" injunction which is add  
defendants, John Doe, Richard Roe, "and all other p  
soever, acting in conjunction with them." If the a  
court or a single judge improperly and illegally prohib  
sary to the successful conduct of a strike, such as pes  
sion, then the court order is in effect a complete  
strike in most cases. Many restraining orders even g  
forbid the strikers "and all other persons, etc.," fro  
undoubted constitutional rights in connection with a  
versy. In the Bucks Stove and Range case,<sup>1</sup> Sam  
and others had established an illegal boycott again  
and other products of the Bucks Company and the  
properly forbidden from continuing it. But the  
Washington court

that he did not commit the act complained of. If from the testimony it appears that he is guilty, he may be allowed to apologize to the court and promise future obedience or in serious cases he may be imprisoned for a short time. These provisions are in themselves most reasonable and lenient and cannot be criticized as severe, but when applied in labor cases, to the violation of hastily issued orders, they cast upon the defendant the reproach of violating the law and of having a jail sentence hanging over him when in fact his action may have been well within his legal rights. Later the injunction may be changed or dissolved altogether by a higher court and the decision and sentence reversed, but henceforth the defendant is stigmatized as an anarchist or a criminal, regardless of the merits of the case.

It was doubtless these considerations and the insistence of the labor unions which led Congress in 1914 to include sections 17 to 25 in the Clayton Act, and thereby regulate the whole question of Federal injunctions in labor controversies. These sections established a new set of rules governing such injunctions, as follows:

No preliminary injunction may be issued without notice to both parties.

No temporary restraining order may be granted without such notice unless it clearly appears from statements supported by affidavit that an immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had. Further, such temporary restraining order must be endorsed with the date and hour of its issue, must be recorded in the office of the Clerk of the Court, and must state the damage and show why it is irreparable and why the order was granted without notice.

Such temporary restraining orders expire in ten days, but may be renewed for a like period if good cause is shown and the reason for the extension must be entered on the record.

Upon the granting of each restraining order without notice the question of the issuance of a preliminary injunction must be set down for a hearing with notice to both sides, in order that the whole question may be inquired into in the presence of counsel for both parties.

Any party served with a restraining order without notice, may upon two days' notice to the applicant, appear before the court and move the dissolution or modification of the order, and a hearing must then be had.

Any party applying for a restraining order or injunction must give security in such sum as the court may deem proper, for the payment of costs and such damages as may be incurred to the parties restrained by the order, in case it is later decided that such parties were wrongfully enjoined or restrained.

Every injunction or restraining order must set forth fully the

reasons for its issuance and must describe in reasonable detail the acts restrained.

In labor controversies no injunction or restraining order shall be granted unless necessary to prevent irreparable injury to property or to the property right of the party making the application, for which injury there is no adequate remedy at law. Such property or property right must be described particularly in the application.

No such injunction or restraining order granted under the above conditions shall prohibit a strike, nor peaceful picketing, nor advising others to strike, nor boycott, nor paying strike benefits, nor peaceful assembling for lawful purposes.

Disobedience of a restraining order or injunction, if it constitutes also a criminal offence under the Federal laws, shall be punished as contempt of Court only after a jury trial if the defense demands it.

But contempt committed in the presence of the Court or so near thereto as to distract the administration of justice, or disobedience to a Court injunction or order in a suit brought by the United States may be punished without a jury trial, as heretofore.

No proceeding for contempt may be instituted against any person unless begun within one year from the date of the act complained of. No such proceeding for contempt is a bar to any criminal prosecution for the same act or acts.

These provisions require little comment. They establish the right of trial by jury for the accused in most of the contempt cases which ordinarily come before the courts in labor disputes, while they also preserve to the Federal Government the right of summary punishment in proceedings which it may bring for the enforcement of its own laws. The provisions also enact into law what was for over a year the practice of the Federal Courts in granting restraining orders, viz., to limit closely the duration of any order issued without a hearing of both parties. They remove the most substantial grievance of the persons enjoined, by providing that the enjoined parties may appear on two days' notice and ask a dissolution of the order. The new law thus effectually improves and modernizes the granting of restraining orders, and brings them within limits which are fair and reasonable to all concerned.

It must be remembered that an injunction is *preventive* and that as such it has the inestimable advantage of preserving property and keeping many people out of jail who would otherwise be placed there by the criminal law because of their hasty violent acts. No amount of criminal prosecution will restore the factories, buildings and rolling stock burned by rioters—this property is a dead loss to the community even though its owners are able to recover damages from the county government for failure to protect their rights. The proper measure is not to prosecute but to prevent and avoid the injury and yet to do so in a way which will preserve also the full rights of both parties. It is this which makes the injunction

question well worthy of the careful study and attention that are now being given to it.<sup>1</sup>

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## QUESTIONS

1. Resolved that the State courts could satisfactorily do the work now performed by the Federal courts. Defend either side of this question.
2. How would you show that all classes of the people have an interest in the protection and development of the Constitution?
3. Explain the rôle of the courts in this development.
4. Why must the courts expand and extend the meaning of the words of the Constitution?
5. Cite some opinions of publicists on this point.
6. Show by examples the Supreme Court's influence in protecting, limiting and expanding the national Constitution and laws.
7. What does the Constitution provide as to the Federal Courts, their establishment, number of judges, tenure of office, method of choice?
8. Could a Federal judge be discharged from office because he did not belong to the same party as the President? What does the Constitution say on this point?
- 8a. Outline all the steps necessary to remove a Judge from office.
9. Outline the organization of the Supreme Court giving the number and salary of the judges and the offices and important employes of the Court.
10. What is the difference between original and appellate jurisdiction?
11. What is the Supreme Court's jurisdiction as fixed by the Constitution?
- 11a. Could Congress pass a law changing the extent of the appellate jurisdiction of the Supreme Court? Why?
12. How does the Eleventh Amendment change the jurisdiction of the Federal courts and why was it passed?
13. If you wish to sue a State where would you bring your suit?
14. Draft a report showing what inferior Federal courts have been established, by whom and under what authority in the Constitution, also the organization, number and general powers of each of the inferior courts.
15. Attend a session of any Federal court and report on the proceedings.
16. Why was the commerce court established? Why was it abolished and what was its practical usefulness?
17. Could Congress abolish the circuit courts of appeals? Why?
18. Could Congress abolish all the inferior courts? Why?
19. If Congress wished to lower the salary of a certain Supreme Court

<sup>1</sup> The best presentation of the case for and against the injunction and its amendment is to be found in the hearings of the Sub-Committee of the Senate Committee on the Judiciary at the second and third sessions of the 62d Congress, on House Resolution No. 23635. See also the hearings before the House Committee on the Judiciary in 1911.

Justice could it do so by law or must it reduce the pay of all S. C. justices equally? What part of the Constitution governs this question?

20. Could Congress constitutionally establish a special U. S. Court which would have jurisdiction over patent cases? Explain.

21. Explain fully the constitutionality of Congressional acts providing as follows:

- (a) Abolishing the present Supreme Court.
- (b) Abolishing the present District Courts.
- (c) Reducing the number of members of the Supreme Court to seven upon the death or resignation of the next two Justices.
- (d) Providing that the Justices of the Supreme Court may be appointed by the President without the consent of the Senate.
- (e) Providing that the President may discharge District judges for sufficient reasons which may be reported to Congress.

22. Outline the general jurisdiction of the Federal courts.

23. Explain how cases are usually brought to the Supreme Court. Examples.

24. Explain some of the general principles guiding the Supreme Court in deciding on the constitutionality of a law.

24a. A State statute of 1901 covering the subject of bankruptcy conflicts with an Act of Congress of 1898; which is supreme? Supposing the Act of Congress was passed in 1904, which would be supreme?

25. How does the Constitution fix the order of the supremacy of laws?

25a. A citizen of Pennsylvania, while employed on a trolley car in Trenton, is injured. Where could he bring suit if unwilling to go to Trenton? What provision of the Constitution applies?

26. Do questions of State law, involving no constitutional point, ever come to the Federal courts? Explain.

27. How are the Federal courts guided in deciding on the meaning of State laws and State Constitutions and the powers of State officials? Why?

28. In executing the decision of a Federal court the marshal is opposed by force. What can he do?

29. Will the Supreme Court advise the President as to the constitutionality of proposed Federal acts? Why? Example.

30. In a debate you desire to show that the Supreme Court has the constitutional power to declare both (a) Federal and (b) State laws unconstitutional. Outline your arguments.

31. Explain the Court's position on this question in any decision which it has handed down.

32. What are the causes of slow procedure in the Federal courts? How could this be remedied?

33. How could action by the Supreme Court be hastened?

34. Resolved that court procedure should be simplified to reduce the cost and delay in law suits. Defend either side of this question.

35. Explain why the conservatism of the courts has been criticized and give your impressions of this criticism.

36. What is an injunction? How is it usually granted?

37. Explain the criticisms of the injunction as applied to labor cases.

38. Will the courts grant an injunction forbidding the mention of a labor controversy in speeches and writings of either party? Why?

39. Apply the Clayton Act to the following cases:

(a) The employes of John Doe & Company demand higher wages, shorter hours and employment of Union men only. In order to secure their demands they strike and declare a boycott of the Doe Company's products sold in interstate commerce, and seek to persuade the public generally not to purchase the Doe Company's goods. A heavy loss of business is threatened, and the Company asks for an injunction on the ground that the combination is illegal under the Sherman Act. Decide the case and give reasons in full, with reference to the Clayton Act.

(b) The Chicago and San Francisco Railway Company is asked to increase the wages of its engineers and conductors. It refuses. The employes strike and

appoint a committee on picketing, the duty of which is to persuade prospective employes not to seek work with the company. Can the Company secure an injunction under either the Interstate Commerce law or the Sherman Act? Reasons.

(c) A Federal Court is asked by an interstate railway company to grant an injunction to prevent the destruction of its property. The Company produces evidence showing a plan to destroy the company's property a year from date, and the proof that the property destroyed is worth \$2,000. The Company asks for an immediate restraining order without notice to the opposite party, a labor union. What action will the court take and why?

(d) A temporary restraining order is issued by a court without hearing both parties, but simply upon the evidence offered by the plaintiff. Immediately after the order has been issued the party restrained appears before the court and asks that the order be cancelled. What must the court do?

(e) A witness in a law suit growing out of a labor dispute in interstate trade refuses to answer a question after being ordered to do so by the court. Upon being summoned for contempt of court he claims a jury trial. What will the court decide and why?

(f) During the course of an interstate railway strike both parties to the dispute engage in violence, attacking each other with armed force. On application of the United States District Attorney the Federal District Court grants an injunction commanding both parties to cease and desist from such violence. Both parties disobey the Court order, and when summoned to be punished for contempt of Court, both claim a jury trial under the Clayton Act. Decide the case with citation of the Act.

40. After reading the references and securing the opinion of an experienced attorney or judge, prepare an essay on the court system of your State and its chief problems.

41. Lay the essay aside and attend a civil and a criminal trial in your county. Criticise and revise the essay.

## CHAPTER XVI

### THE STATE GOVERNMENT—THE CONSTITUTION

**New Duties of the State.**—The growth of the National Government has not meant the drying up of State powers. During the last thirty years the duties and activities of the commonwealths have increased fully as fast as those of the Federal union. This increase is due to extensive changes in business conditions. It is noticeable that most of the questions with which the States now have to deal, have sprung from manufacturing industry. For example:

- The rise of urban districts and the various city problems;
- The tenement house;
- The conditions of workers in factories, stores and sweatshops;
- The adulteration of foods;
- The existence of a large, ignorant class in the population;
- The necessity for better means of communication;
- The unchecked license in the promotion and management of corporate undertakings;
- The development of class feeling between employers and employés;

The breakdown of the old system of caring for the poor and the criminal classes. These are all the result of new conditions arising from the business development of recent times.

**Influence of Mechanical and Scientific Progress on Government.**—The chief source of this increase of State work is the progress of scientific inventions and discoveries. We Americans like to point to the influence of a single statesman or philosopher upon our political life, we like to say that Washington achieved Independence and that Lincoln saved the Union, and it is true that in times of emergency and crisis the action of one man may commit the nation to a policy from which it cannot turn back. But if we consider ordinary periods of quiet, natural growth, we find that public policy is really determined by the influence of new inventions and scientific discoveries, remote as these may be from the field of politics. Science has done more to change our national life and policy than has the reasoning of political philosophers. Let us glance at one problem which has a special bearing upon the State governments at the present time, viz.—the conflict between Socialism and Individualism. For generations the political philosophers of the world have been divided into two factions, the Individualists contending that the government should regulate nothing, but should leave all to the free action of the individual,—and the

Socialists, claiming that it should manage everything, even own, control and operate all forms of business. In America, although this discussion has been carried on for a generation, we are not Socialists in principle; the real underlying force which has finally caused the increase in State regulation has been a series of mechanical inventions. To-day we admit without question that that immense and ever-growing mass of tangled problems that we call "the industrial system," and which includes the factory question, the labor problem, the corporation problem and other questions of large scale production, may be traced directly back to the invention of the *steam engine*. The mechanical discovery creates the social problem. The perfection of the *passenger elevator*, or "lift" has created the modern office building whereby a population equal to that of a small town may be gathered under one roof and the greater concentration of business within a city made possible. Similarly the invention of the *trolley motor* has built up the "suburban city" with all the changes in government and social life which accompany it. Equally interesting is the political influence of medicine. The growing idea that we should prevent disease rather than merely cure it has brought with it a fresh view of the State's duties to the people; it is to be traced to the *germ theory* in medical science. Finally the educators of the country have observed the effects of our mechanical and industrial progress, have seen the need of new kinds of school and college training and have broadened and extended the educational system to meet these demands with the result that the activity of the State governments has again expanded. In all these fields, scientific inventions have so changed the conditions of health, of education, of factory and of city life that the work of the State in regulating these questions has grown to enormous proportions. From a quiescent, almost decadent body the State has been transformed into a powerful and essential influence in the life of the people. Yet the people have not been convinced of Socialism as a general principle—they have taken little interest in the Socialistic movement; they simply demand that the State shall make itself more useful. The name "Socialism" is of course often used as a stigma to frighten the timid from any and every extension of State powers but it is safe to say that no useful change in government can be either adopted because it is Socialistic, or defeated because it is called such. The real influence behind government changes is the determination of the people to make that immense body of scientific inventions, discoveries and devices, which is now so rapidly coming to us, more serviceable and helpful to all classes.

We shall consider first the constitution and machinery of commonwealth government; second and more important, what the State is doing for its people,—its work.

**State Constitutions.**—The State constitution, like that of the nation, divides government into three departments, *Executive,*



provisions ought to be ordinary laws, but distrust of the legislature has led them to fix its power as far as possible. For example, we find that the State constitutionally guarantees such fundamental rights as

**Freedom of Speech and Press,**

**Religious Liberty,**

**Honest Elections,**

**Jury Trial,**

**Habeas Corpus, etc.,**

and it goes into great detail to forbid special laws affecting any person, place or corporation, granting special privileges to any person or corporation a special privilege; forbids any law which increases the compensation of corporate employes after the service has been rendered; regulates the powers and duties of any local government; and requires that notice be given to all who may be interested.

Many constitutions also regulate the laws on corporations in such a way as to guard against legislative abuse. Some require the rights of shareholders to be fully protected, by giving them the right to vote or otherwise, and in general the greatest care is taken to prevent the predatory exploitation of corporate property by a clique through majority control of the stock.

**The Amendment of the State Constitution.**—Most constitutions provide that single amendments must be passed by the legislature at two successive sessions, and then referred to the people for approval. Some States require the legislature to submit to popular vote the question whether the constitution shall be revised by a convention. Ordinarily a total revision can be made only by a convention called after the expiration of a certain period.

attracts no attention. Accordingly, it is most improbable that a majority of those voting will vote on the amendment at all and still more improbable that a majority can be secured favorable to it regardless of its merits. Such a provision exists in the constitution of Illinois, and in Professor James W. Garner's opinion,<sup>1</sup> it "makes the Illinois system of amendment one of the most archaic and cumbersome in the world, and has already retarded the progress of the commonwealth." It is coupled with the provision that a constitutional change may only be submitted to the voters once in four years.

In Indiana the constitution provides that a majority of those voting at the election must favor the amendment and, furthermore, than an amendment, once submitted to the people, is before them indefinitely until either approved or disapproved by a majority; and, finally, that while an amendment is so pending no other change may be proposed. This has effectually bottled up all normal constitutional growth in Indiana for over fifty years. Some decades ago a proposal was made for a change in the requirements of admission to the bar; this, being a constitutional amendment, was submitted to the people but failed to secure the sufficient attention to obtain a majority and accordingly has been before the people indefinitely, but meanwhile blocking the proposal of any other constitutional change. In some of the New England States notoriously unequal systems of representation of the towns, in the State legislature, have existed since the Revolution; but owing to the impossibility of passing an amendment through the legislature to remedy this inequality, the States are still governed by minorities.

**Desirable Provisions as to Amendment.**—When constitutional conventions are to be held it is highly important that the Constitution itself should provide as fully as possible for the method of election, the organization of the body and other matters which affect its procedure; in general, the more completely this is prescribed in the Constitution, the better. Professor Garner shows the practical benefits which such a system offers in carrying out the popular will.—"The new provision in the New York Constitution is a notable example. . . . By the Constitution of that State the participation of both executive and legislature in constitution making is, as already remarked, reduced to a minimum. No legislative act is necessary to bring the convention into existence when once the people have voted in favor of revision. Moreover, the constitution itself fixes the number of delegates, the time and method of choosing them, their qualifications and compensation, the time and place of the meeting of the convention, the number of delegates necessary to make a quorum, and even prescribes some of the rules of procedure."<sup>2</sup>

<sup>1</sup> *American Political Science Review*, February, 1907.

<sup>2</sup> "The Amendment of State Constitutions," *American Political Science Re-*

In the States which have direct legislation, the people are allowed to propose amendments without the intervention of the legislature. A small proportion of the total number of registered voters, usually from eight to fifteen per cent, may sign a petition to which the proposed amendment is attached, asking that it be submitted to the approval of electors. If at the next election a majority approve the amendment, it then becomes a part of the constitution without legislative action. Severe criticism has been devoted by some publicists to the fact that the voters are constantly harassed by cranks and enthusiasts who want new features placed in the fundamental law. Yet of the two dangers the rigid, inflexible, unchanging constitution is certainly the greater. It tends to keep back the development of the government until some explosion of popular indignation takes place, when a hasty, ill prepared amendment may be passed, and thereby may become fastened on the government by the same difficulty of making a change.<sup>1</sup>

**The Election Laws.**—It is in the election laws of a State more than in the high-sounding phrases of its constitution, that the real political rights of the people are guaranteed. We may find the most flattering language of democracy in the fundamental document but if the laws do not secure the fair, just and accurate expression of the people's will at the polls, democracy becomes as sounding brass. The essential points in our State election laws are:

The qualifications of voters,  
 Registration,  
 State regulation of party machinery to protect the voter,  
 Nomination of candidates,  
 The Ballot,  
 Corrupt Practices Acts.

**The Right to Vote.**—The State determines who may vote at both its own and national elections. The franchise requirements are the same for each office except that some States allow all property holders to vote for school and tax boards in the districts where their property is located. There is wide diversity in the qualifications of voters in different commonwealths. They all require electors to be 21 years of age and nearly one-half allow women to vote or will do so if pending constitutional amendments are approved. Several require educa-

*view*, February 1907, page 240. He also points out the value of having individual amendments proposed to the voters at a *special* election, as in New Jersey, rather than at the general election, when they will be ignored or overshadowed by other issues. His demand for a more facile method of constitutional change voices an opinion which is rapidly gaining ground in all the States,—“In conclusion it may be asked whether, in the effort to prevent too frequent and ill-advised changes in the State constitution, the reactionary pendulum has not swung to the opposite extreme, and, instead of progress and growth, we are now confronted by constitutional stagnation, if not retrogression.”

<sup>1</sup> An admirable description of the methods of amendment may also be found in W. F. Dodd: *The Amendment of State Constitutions*. See also Prof. J. Q. Dealey's article on “Tendencies in State Constitutions,” in the *Political Science Review*, February, 1907.

tional tests. Of these Connecticut is a type. Its constitution provides that no one shall vote unless he can read any section of the constitution or of the laws in the English language and can write his name. In Pennsylvania and many of the Southern States there is a small property qualification in the shape of a poll tax. This is  $\$1$  in Pennsylvania and from  $\$1$  to  $\$2$  in the South. Most of the Southern States located in the black belt have found it necessary to debar the negro from voting. This is done by an educational test or by the property qualification, notably the requirements that voters must have paid all poll taxes for five years, or by a clause which, as in Alabama, requires that electors to be registered must be persons of good moral character who understand the duties and obligations of citizenship under a republican form of government. The constitution of that State also authorizes the registering board to require the applicant to state under oath the name or names of all his employers for the last five years, any willfully false answer being perjury. As many of these clauses would debar the whites also, various devices have been invented to include the white vote. One of these is the grandfather clause. In Louisiana and North Carolina all men who were voters before January 1, 1867, and in Louisiana the sons and grandsons of such men and in North Carolina all lineal descendants of such persons, who were or might become voters before 1908, remain for life qualified to vote, regardless of the educational or property qualifications. In Virginia all adult male persons who do not own property and cannot pass the educational test may vote if they have served in the army or navy of the United States or of the confederate States, or if they are the sons of persons who did so serve. Although the 15th Amendment prohibits the States from denying the right to vote to anyone, on account of his race or color, it has been possible to exclude the great masses of negro voters by these provisions or by the peculiar interpretation which the registry boards give to them.<sup>1</sup>

It would be a calamity for the South to fall under the political control of a backward uneducated element, either white or negro, but it would seem desirable to exclude this element by some fairer means than those described. Such devices have resulted from the mistaken policy of the 15th Amendment. Its repeal would remove from the southern white race the fear of black domination, would enable the parties to vote on other than racial issues and would soon produce a fairer spirit towards the negro himself and a better cooperation between the races.

**Woman Suffrage.**—The State constitutions and legislatures are gradually providing for the enjoyment of the right to vote by women, upon equal terms with men. This change has followed a long and impressive agitation of the public mind, carried on in a way that shows the remarkable influence of public opinion and the modern means of arousing and molding such opinion. The suffrage has been

<sup>1</sup> See the article, "Negro Suffrage" by J. C. Rose, *American Political Science Review*, Volume 1, page 17.

granted to women in so many States without creating any of the bad effects feared by its opponents, and with some good results, that the more conservative commonwealths are now falling into line.<sup>1</sup>

**Registration of Voters.**—Among the many methods of making up the list of qualified voters in each district, that which has proven most satisfactory is the personal registration plan, first adopted in California, and used in most of the commonwealths in which there are large cities. This involves the personal appearance of the voter before an official board of registrars, usually meeting at the polling place about 60 or 90 days before the election. The voter makes affidavit as to his identity, age, citizenship, length of residence in the State and district, his home address and his place of birth. If naturalized he must produce his papers; if the law requires a poll tax, he must show his receipt. If an educational qualification must be satisfied, the registry board applies it. Opposite his name in the registry book, the above facts are entered and with them a brief description of the voter's personal appearance, and his signature. In New York he repeats his signature on election day, for comparison. The advantage of this plan over the old method of registry by visiting assessors who called at each residence, is that personal registration immensely reduces the opportunity for fraud and repeating and makes "mistakes" of election assessors impossible.

**State Regulation of Party Machinery.**—The regulation of the party itself is necessary to secure fairness and make each party organization more representative of the rank and file of its members. There can be no doubt that, left to itself a party machine tends to slump into the hands of those interests and cliques which devote the most time, capital and organization to it, and that these by no means represent the party voters in any true sense. For this reason, when some issue arises in which the people do take an active interest they usually find the machinery of both parties in the hands of rings which attempt to stifle or block any movement towards progress. Accordingly, several of the States have provided that the State committee which is the controlling executive body, shall be elected by the party voters, one member from each locality. Pennsylvania allows one committeeman to each of the fifty senatorial election districts, Wisconsin two to each Congressional district. In those commonwealths which have not yet abandoned the older convention form of nominating candidates, the convention usually chooses the committee, but this is of course the favorite method of taking control out of the hands of the party members.

A party is usually defined by the laws as being an organization

<sup>1</sup> Woman suffrage has been adopted by the following thirteen States and territories:

Arizona  
California  
Colorado  
Idaho

Illinois  
Kansas  
Montana  
Nevada

Oregon  
Utah  
Washington  
Wyoming  
Alaska

of voters which at the last State election cast a certain number of votes (New York) or a certain proportion of the total vote (Oregon). All details of arrangement of the ballot, the time and place of holding the nomination elections, and the expenses of the same are fixed by law under the new system, the purpose being to prevent members of other parties from interfering, and to minimize opportunities for fraud and mistake.

**Direct Primaries.**—Although some of the States still nominate their party candidates by conventions, in which all the old devices of former times are resorted to in order to manipulate the choice, the movement for direct nominations by the party voters has now reached national proportions and has almost displaced the older system.<sup>1</sup> The direct primary law usually provides that the primary nomination shall be held at the same time for all parties, and shall be under official State control. Prior to the primary, the State or local officials in charge receive lists of candidates,<sup>2</sup> whose names they print upon the separate ballot of each respective party. The vote on these names is then taken in regular election booths by the voters, each party having its own ballot.<sup>3</sup> If the voter is not required to register his party affiliation, but may choose the ballot of any party that he wishes, the plan is called the "open primary." When he must announce his allegiance and ask for the ballot of his party by name, the plan is called the "closed primary."

Both plans have serious defects in practice; the closed primary makes known every voter's party allegiance and defeats the principle of the secret ballot. The open primary allows the leaders of a large majority party, especially in the cities, to order a number of their henchmen to vote the ballot of the opposition or minority and on it to support candidates for nomination who will be friendly

<sup>1</sup> Strenuous efforts have been made to arrange the primary laws so as to favor the small governing cliques in each party, by such expedients as the requirement that the voter must announce his party allegiance when he enters the primary, or that new parties may not be formed except under most difficult conditions, or that candidates for certain offices, at least, may be nominated at conventions, but these devices are unable to stay the widespread general tendency to place the party under the control of the mass of its voters and make it responsive.

<sup>2</sup> The State laws usually allow the suggestion of such names by petition with a number of signatures, or upon simple application and payment of a moderate fee.

<sup>3</sup> The first direct primary system, established as a substitute for the convention, was adopted in Crawford County, Pennsylvania, in 1868. The voters in each party, by agreement of the party leaders, determined directly by ballot the nominees of that party for the succeeding election. The system worked successfully and was later adopted in several other counties of the State. Its practical weaknesses arose from an extensive system of vote buying and from the great preponderance of the cities and towns in nomination. The urban districts, because of their large subservient vote, could easily outweigh the farming sections. Despite these defects the system was in the main satisfactory and contained the chief principle upon which the later State laws were based. See E. C. Meyer, *Nominating Systems*, First Edition, pages 147 and ff.

... nomination by a simple  
 case, the person who receives the highest number of vote  
 party's nominee, even though he has not a majority of  
 . He may, in fact, be objectionable to the majority of  
 the primary and it is this possibility of a minority deter-  
 mine the choice which has led some of the western States to  
 preferential voting at the primaries. That system en-  
 able the voter to express his first, second, and sometimes his third  
 choice in each nomination.<sup>1</sup> In this way a majority control of the  
 result is always assured. The direct primary has already been  
 established by law or by party rules in thirty-eight States.<sup>2</sup>

**The Advantages of the Direct System.**—Many theoretic  
 and defects of the direct nomination plan were prophesied  
 before its general adoption. A full list of these may be found in Dr. ...  
*Nominating Systems*,<sup>3</sup> but the direct method has not worked  
 out as either its friends or its enemies claim. (a) It has  
 destroyed the party "organization" or "gang,"—but has  
 increased the efforts and methods of that body and brought it  
 into the light than ever before. Some organization is neces-  
 sary to bring out the weaker from the stronger candidates, the political  
 leaders find it to their advantage to favor a subservient type  
 of office and they still enjoy the advantages of system, in-  
 dependence and appeal to self-interest and prejudice. Accord-  
 ingly the direct primary has in a manner changed the methods of or-  
 ganization. Were all our political leaders angels from Heaven, those  
 who refused to be organized would win and those who refused to  
 be organized would not. Undoubtedly, however, the character of the or-  
 ganization is provided by the Wisconsin Act of 1911.

The list is as follows:

Alabama  
 Arizona

Maine

Ohio

tion has been immensely improved by forcing the entire process of nomination out into the open and by greatly increasing the opportunities for new men who have not the official O. K. of the leader. In short, the organization has been made more responsible, which was, after all, the real purpose of the direct plan. (b) It has not eliminated "business" from politics. The strong corporations and their economic interests are forbidden to contribute to campaign expenses, but this does not prevent their large shareholders from supporting within each party the candidacy of those men who will "do the right thing." But the new plan offers a complete ventilation of the claims of the various candidates and allows and encourages the voter to register his preference with the valuable knowledge that his vote will count as it is cast and that no delegates to a convention, pledged to one candidate, can be manipulated to another. (c) The critics of the direct primary plan claimed that it would increase vote buying and the old-fashioned campaign through the saloons to secure popular favor. This has not proven true in practice. There has been a great increase in expenses for advertising, for travelling and for generally getting acquainted. There has also been an enormous growth of speech-making in the cities and at the country cross-roads, and many pious pledges have been given by candidates in the primary campaign which were slightly florid in character. But it cannot be said that either bribery or carousing and intoxication or other improper methods of influencing the voter have been resorted to; on the contrary, the direct primary has vastly increased the more serious methods of influencing public opinion and has focused attention upon the real substance of public policy in a way which was never possible before. All observers agree also that it has immensely raised the vote cast at the primary elections. It is more truly representative of party opinion than the old convention system.

**The Ballot.**—Two forms of ballot are now struggling for popular favor; the older style is known as the "party column," in which all the candidates of one party for the various offices are arranged in a vertical column under the party's name, usually with a circle at the top in which the voter by placing a mark, may at one stroke vote for all the candidates of that party,—“a straight ticket.” Of course the party leaders strain every effort to force the voter to do this, since it immeasurably strengthens their control over the party machine. The usual form of party column ballot is given below:



## THE PARTY COLUMN BALLOT

DEMOCRATIC For a straight ticket mark X in this circle <input type="radio"/>	REPUBLICAN For a straight ticket mark X in this circle <input type="radio"/>	PROGRESSIVE For a straight ticket mark X in this circle <input type="radio"/>
<i>Governor</i> John Doe <input type="checkbox"/>	<i>Governor</i> Richard Roe <input type="checkbox"/>	<i>Governor</i> Richard Jones <input type="checkbox"/>
<i>State Treasurer</i> William Tompkins <input type="checkbox"/>	<i>State Treasurer</i> Henry Wright <input type="checkbox"/>	<i>State Treasurer</i> John Smith <input type="checkbox"/>
<i>Auditor General</i> James Williamson <input type="checkbox"/>	<i>Auditor General</i> Harvey Wiley <input type="checkbox"/>	<i>Auditor General</i> Thomas Perkins <input type="checkbox"/>
<i>State House of Representatives</i> William McGuire <input type="checkbox"/>	<i>State House of Representatives</i> Thomas Dougherty <input type="checkbox"/>	<i>State House of Representatives</i> Frank Small <input type="checkbox"/>

The square at the right of a name is marked by the voter who wishes to "split" his ticket.

Straight voting is praised as a virtue, the voters who obey are called "stalwarts"; malediction and political excommunication are threatened upon those who split their tickets and at every chance the election laws are covertly worded so as to make split voting difficult,—but all in vain. The tide has set toward greater independence of the voter, the belief has arisen that a party should be a servant, not a master, a means rather than an end. The number of those who say with a complacent smile on election day that they "voted the straight ticket," with the air of having saved the Republic, is growing steadily less.

**The Australian Ballot.**—The public mind is turning toward a new type of ballot—the Australian, which places the names of candidates of all parties for a given office in alphabetical order giving each candidate's party affiliation after his name, thus:

Sheriff,  
John Doe, Democratic,  
William Tompkins, Republican,  
Henry Zane, Prohibition.

This makes straight ticket voting impossible and requires the elector to make a mark opposite the name of each candidate for whom he votes. It is the form used in Australia,<sup>1</sup> and has been in use in Massachusetts for many years. The great advantage of this arrangement is that it makes it just as easy to make a split ticket as a straight one, and thereby gives us the benefit of that very large vote by persons who would willingly make a real choice between candidates if they were allowed a reasonable opportunity. The Australian or Massachusetts ballot is the only form which offers this opportunity. It is now proposed to strengthen the ballot further by reducing the number of elective officers so that the voter may concentrate his attention upon a few important positions and make a real choice.<sup>2</sup>

The alphabetical ballot was first adopted in America in 1888 when Massachusetts and Kentucky abandoned the old vest pocket type and established the Australian form. The vest pocket plan allowed each voter to write on a ballot or attach to it by stickers the names of the persons whom he favored for each office. It was a simple matter for the local party worker to furnish these stickers to the voters as they entered the polls, and even to attach them to the ballot himself. The "making up" of ballots in this way was the rule rather than the exception. The ease of manipulating the ignorant and subservient vote and the publicity which attached to voting by the vest pocket plan has caused its abandonment in all the States. The new form has been adopted by 14 of the commonwealths while 27 have what is called the Indiana or party column form. The latter is gradually losing ground to the Australian system. Some of the States have adopted a rule requiring a name to appear in only one place on the ballot. Such a rule is reasonable if combined with the alphabetical form but when applied to the party column ballot it prevents several parties from uniting on the same candidate; this is a serious, if not insurmountable obstacle to the reasonable union of small parties,—a union which it is greatly to the public interest to facilitate.

**Corrupt Practices Acts.**—In order to prevent bribery and other gross forms of dishonesty in elections and to discourage the employment of large sums of money in influencing the electorate, a whole series of election laws and "corrupt practices" acts have been passed by all the States. These prohibit the offer or acceptance of money or other valuable consideration by a voter, a delegate, a committeeman or nomination or election official, to influence his action. If such violation of the law is proven to exist on a scale which would influence the result of the election, the courts may order a new

<sup>1</sup> A number of other forms of ballot even including the old party column style, are sometimes wrongfully called the "Australian" ballot but the only form which can properly claim the title is the alphabetical arrangement given above.

<sup>2</sup> See the Chapter on The Short Ballot.

political managers or campaign committee treat an official statement under oath, of their nomination expenditures (New York, Pennsylvania and many others) and prohibit the payment by corporations of any gifts to party funds. This latter is also forbidden by Act of 1907. It was formerly the custom for the large to contribute heavily to the treasuries of both parties which supposedly gave them immunity from hostile action. In New York an attempt has been made to to which election funds can be devoted, by limiting the ling expenses, personal outlays of candidates, payment workers, meetings, printing, etc. These provisions evaded. All the rules against bribery of voters are now violated in close city elections by the simple expedient voters on the party pay roll as additional "workers" and pinning a badge on them and giving them nothing to do. Most of the States have found it difficult also to regulate tion of assistance to voters. The Pennsylvania statute provides that "If any voter declares to the judge of election *by reason of any disability* he desires assistance in the preparation of his ballot, he shall be permitted by the judge of election a qualified voter of the election district to aid him in the preparation of his ballot, such preparation being made in the voter's apartment." (Act 1893, Sec. 26, P. L. 432.) Such "assistance" is supposed to be required by voters who from physical defective eyesight, or illiteracy are unable to mark the ballot. But the laws allowing "assistance" are becoming extremely popular because of their abuse by corrupt political workers. Purchased voters will not "stay put" but will sell sides and then

then makes sure of the consummation of the bargain by marking the ballot himself in the booth. The word "assistance" should be more closely limited to cases of physical incapacity or, better still, dropped altogether.

**Greater Honesty in Elections.**—Undoubtedly the last decade has seen a marked improvement in the purity of election laws and their administration and a demand for still stronger action is prevalent in all parts of the country to-day. Reaction is especially strong in the large cities where the domination of the leader and his petty minions has been most absolute. This improvement has not kept pace with the public standard of morality, however, and many observers are inclined to be pessimistic because of the greater distance still remaining between the public conscience and the actual results so far realized. Prof. Beard<sup>1</sup> says:—"Just as in the familiar contest in the field of naval construction between high-power projectiles and still more powerful defensive armor, so every advance in the direction of greater rigor and minuteness in the provisions of the election law has been met by a more than corresponding systematization and perfection of the methods of evading such provisions." We must remember, however, that the vast improvement of recent years is only the first fruit of a new movement towards the organization and modernization of what were formerly called reform elements in politics. These scattered factions and influences were mere temporary groups with no common center and little capacity for co-operation. They are now being gathered together in permanent clubs and are beginning to see the advantages of modern systematic methods of guiding public opinion. In every large city to-day there is some organization such as the city club of New York or Philadelphia. These clubs hold together the advanced and progressive elements in each municipality and make a permanent point of departure for municipal movements. There are also many municipal leagues of a non-partisan nature, whose chief aim is to concentrate public attention upon the records and principles of candidates for local office. Foremost among these is the Chicago municipal voters league which, without proposing candidates of its own exerts a strong and often successful influence at elections by showing what the candidates have done to deserve public reward or otherwise. Closely related to these are the many business associations, city, State and national, almost all of which throw their influence, when possible, toward the improvement of government methods. It has become customary in most of these commercial bodies to devote at least a part of the time of their meetings to the consideration of some public improvement question.<sup>2</sup> The very fact that popular opinion is now so far in advance of existing methods of government is the most encouraging sign of the times. The results already achieved have three im-

<sup>1</sup> *American Government and Politics*, p. 685.

<sup>2</sup> See the sections dealing with Public Opinion.

JAMES W. GARNER, in *American Political Science Review*, 1  
*The Amendment of State Constitutions.*

C. L. JONES: *Readings on Parties and Elections.*

C. E. MERRIAM: *Nominating Elections.*

E. C. MEYER: *Nominating Systems; a second edition in preparation*  
*Election law summaries published by the State committee of*  
contained in the State handbook.

### QUESTIONS

1. Why has not the growth of national authority weaker governments? How have business and economic changes affected governments in the last thirty years?
2. You are present at a discussion of the relative influences of government by unusual personalities and by ordinary scientific methods respectively. Explain the views which you would advance on either discussion.
3. Would you attribute the recent growth of State powers to doctrine and agitation? Reasons.
4. When was the present constitution of your State adopted? Give a brief outline or table of contents of it showing the main topic of each and article.
5. Why does the State constitution contain so many provisions of law?
6. What are special laws? Local laws? Why are they forbidden?
7. Show the similarity between the bill of rights in your State and that in the national document.
8. How is your State constitution amended? When was it changed?
9. Explain why the constitutions of Illinois and Indiana are amended.
10. The members of a constitutional convention are considering dealing with future conventions—should they make this detailed of character? Reasons.
11. A convention is about to consider the article on single and give your impressions as to a wise formulation of this article.
12. Why are the election laws of --

20. Explain the extent and causes of the progress of woman suffrage and give your own views as to its advisability.
21. Outline a plan of personal registration of voters. Why is it needed?
22. Why has the State regulated party machinery and organization?
23. How is the State committee of each party chosen in your State?
24. How does your State law define a party?
25. What is a direct primary and why is it now established by law?
26. Outline the chief provisions of such a law.
27. Describe the Crawford County system as first adopted in this country.
28. What is the difference between the open and closed primary?
29. Outline briefly the disadvantages of each and give your impressions as to the better plan.
30. How are the expenses of direct primaries paid and give your impressions of the wisdom of this plan of payment.
31. Outline the primary system existing in your State.
32. Why does party leadership and "organization" still exist although in less despotic form perhaps, under the system of direct primaries?
33. What is the difference between the plurality and majority methods of nomination?
34. Explain the preferential voting system and give your impressions as to its value.
35. Prepare an essay on the direct primary after reading the references, and secure the opinions of two political workers of opposite parties in your district,—give your conclusions as to the advantages of the direct system.
36. Explain the old vest-pocket method of voting.
37. Contrast this with the modern ballot as used in your State.
38. Explain the party column form of ballot and contrast it with the Australian form. Which is the better and why?
39. Give your views of the argument that the ballot law should strengthen party control by making it easier for the party worker to instruct and advise voters how they should cast their ballots, and by making it more difficult for independent movements to arise and for independent voters to split their ballots.
40. What are your impressions of the rule requiring a candidate's name to appear only in one place on the ballot?
41. What is a corrupt practices act? Outline the chief provisions of these laws.
42. Why should a corporation not contribute to a political campaign fund?
43. Why should a voter be allowed to have assistance?
44. Explain the disadvantage of the "assistance" clause in the election laws and suggest a remedy.

## CHAPTER XVII

### THE STATE—Continued

#### THE EXECUTIVE, LEGISLATURE AND COURTS

**The Governor.**—The State executive is slowly struggling upward into the same position of leadership that has already been won by the President. For many generations the Governor was a mere figurehead, because in Colonial days he had been the “royal executive” and, as such, the means of royal oppression and tyranny. When the Colonies became States in the Revolution, they immediately stripped the office of its real authority and left it that curious anomaly which it has since remained until the most recent years—a post of much honor but little power. In some of the States half of the Governor’s cabinet are elected rather than appointed. Most of the States still elect the State Treasurer and State Comptroller or Auditor General, and many of them choose even the Banking and Insurance Commissioners and Superintendent of Schools in the same way.

*The chief executive offices are:*

Governor,  
Lieutenant Governor,  
Secretary of the Commonwealth,  
Attorney General,  
Treasurer,  
Comptroller or Auditor,  
Banking Commissioner,  
Insurance Commissioner,  
Superintendent of Public Instruction,  
Industrial Commission,  
Factory Inspector,  
Highway Commissioner,  
Board of Health,  
Bureau of Charities,  
Public Service Commission, etc.

So far as these officials are elected they are of course independent of the Governor. In fact the strongest influences of tradition and popular prejudice have prevented the Governor from becoming the controlling force in the commonwealth government and in many States he is dependent at every turn upon the leader of his party, as we shall see.

While the legal provisions as to the Governor’s election, term of

office and qualifications differ widely in the various States, there are certain general provisions common to all. The Governor is elected by popular vote, a simple plurality<sup>1</sup> being sufficient. In most of the commonwealths he is nominated by a direct primary. These direct primaries are usually held from two to four months previous to the election. The nomination in this way has been taken out of the hands of a party convention which formerly controlled it and in which delays and manipulation of delegates were notoriously frequent. The usual qualifications required of the Governor are citizenship, residence within the State for a period of from five to seven years, and a required age of thirty to thirty-five years. The old feeling of distrust of the executive shows itself in the short term of two years which many of the States provide. A majority, however, now retain their executives for four years, and this is the better course, since no Governor can do half of what is expected of him in two years. In fact, most of them have only fairly started upon their plans of legislative and administrative progress at the end of the second year. In Indiana, Pennsylvania and a few other commonwealths the executive may not succeed himself, although he may be re-elected after a succeeding Governor has intervened. This curious provision completely defeats any effort at consecutive work through a term of years on the Governor's part. Most Governors begin during the first or second year of their administration to force promised changes in legislation. This brings them into immediate conflict with many strongly entrenched interests, partisan and otherwise, in the State, a conflict that wages for several years. To forbid the Governor to succeed himself is to prevent him from organizing his forces in the struggle; from the outset the shortness of his tenure is a serious handicap. The Governor's term of office should be extended and he should be allowed to succeed himself for at least one term. The salary varies widely according to the tradition or freedom from tradition in each commonwealth. Until recently some of the New England Governors were paid only nominal amounts,—in one State as low as \$1,500. In that section and in the South salaries are still low, Vermont paying but \$2,500. The highest paid is in Illinois, \$12,000, while the large and wealthy States of New York, Pennsylvania, Ohio and New Jersey pay \$10,000.

*The most important of the Governor's duties are:*

Appointments,  
Legislative Veto,  
General Executive Powers,  
Judicial,  
Military.

**Appointments.**—The appointing power has doubled and even trebled within the last twenty years because of the growing work of

<sup>1</sup> By plurality is meant the highest number of votes cast for any candidate. A majority requires more than half of the total votes.



the State and the new offices which have been created to carry on this work. Each appointment is made after consultation with the ruling political leaders, and all important factions of the party and all parts of the State must be represented in the offices. In several of the commonwealths a system of appointment by civil service rules has been adopted for the subordinate positions, notably in Massachusetts, New York, and Wisconsin, where the plan has proved successful in reducing the pressure for purely political appointments.<sup>1</sup>

All the States require the approval of the Senate for the Governor's appointments. This has proven a serious obstacle to his control over the State administration. There is no reason why he should not be trusted to select the State officials, even the most important. The question at bottom is after all a simple one,—do we want the Governor to manage the State administration? Or differently expressed, do we want that administration to be controlled by outside forces which escape public observation and responsibility? Every check and limit which is placed upon the Governor's appointive and executive authority is a means of directing power and responsibility from him to these outside forces. Every step taken to increase his prerogatives brings out into the daylight the real influences at work in State government and renders that government more accountable to the voter. Our commonwealth administration to-day is one of indirect responsibility and concealment. It is no coincidence that many advanced and vigorous executives protest against the policy of limiting the Governor's powers at every point. The Governors of Kansas and Colorado have forcibly called attention to this need.<sup>2</sup>

Those who favor the short ballot as a means of making the State government responsive to popular will strongly insist upon the concentration of the appointing power in the Governor's hands.<sup>3</sup>

<sup>1</sup> These are fully described in the Chapter on The Civil Service.

<sup>2</sup> See proceedings of Governors' Conference, 1913.

<sup>3</sup> The Short Ballot Bulletin of June, 1914, points out that the right kind of short ballot is one which fixes administrative responsibility.

"For instance, the State of Maine now has few names on the ticket.

"A Governor, a senator and a member of the lower house of legislation are the only State officers chosen by the Maine voter. The judiciary, the minor State officers and some local officers, elective in other States, are appointed. But how? Therein lies the joker. The governor appoints most of them but his selections must be confirmed by his council. The latter body, instead of being an advisory cabinet composed of men because of their sympathy with his policies, is picked for him by the legislature for terms of one year.

"And so in Maine we find the same lack of directness of control by the people as where the ballot contains from 20 to 50 offices. The Governor is no more responsible for his administration when he has to consult his council than when he has to consult the party boss who exists elsewhere as the unofficial ticket-maker.

"In New York State there are those who believe in the Short Ballot but insist that the Governor should submit his appointments to Senate confirmation. This, we insist, vitiates the whole principle. Nothing must detract from the

**Legislative Power.**—The Governor's personality influences his legislative control; if he is a natural leader and has a hold on the people he may draw up a strong program of popular measures and, concentrating public attention upon these by an open and aggressive campaign of speech-making and public interviews, he may bring such pressure to bear on the legislature as to force his program through. Many successful Governors have done this, among them Cleveland, Roosevelt, Hughes, Lafollette, Johnson, Cummins, Wilson and others. Instead of submitting to the advice and commands from "higher up" they have gone direct to the people and have won. It is precisely this appeal to the voters that determines the strength of the Governor, and brings the office to a plane of real influence.

Finley and Sanderson in their excellent work, *The American Executive*, give the results of an inquiry sent to the Governors of several States, as to their influence in securing legislation. Practically all the answers showed a substantial increase in the governor's influence, some declaring that nearly the entire program mapped out by the Governor was carried into effect by the legislature; others stating that only a small number of the Governor's recommendations were followed, but these included his most important suggestions. Where the Governor and the legislature belonged to different parties or factions, the Governor often appealed to the people and a number of his recommendations were forced through the assembly.

"While all these ex parte answers indicate with one or two exceptions a disposition on the part of legislation to follow executive suggestion, it is apparent even from these letters that it is not a servile following, and it is plainly stated or intimated by two or three that they both follow an imperative public opinion, the governor having the first opportunity to respond, and so giving unintentionally the impression of leading, whereas he, too, but follows. It is apparent, too, that the Chief Executive has found a way of compelling legislation, while punctiliously observing the legislative limitations of his office; that is, by appealing to public opinion to make itself felt in the legislature. There is certainly no menace in the power of the Chief Executive of the Commonwealth. He has too little. Greater centralization of administrative power

governor's accountability. The *New York Times*, in answering President Nicholas Murray Butler, sums up the whole proposition by saying:

"Quite possibly when the voters may concentrate their attention on a short ticket consisting of candidates for Governor and legislator only, they will choose better Governor and better Senators. Undoubtedly they will. But experience has shown that wherever responsibility is divided carelessness or selfish considerations creep in to prevent the best executive action. For some years to come, at any rate, the Senate will not be very trustworthy as a part of the appointing power. . . . No considerable error could be made by fixing the responsibility for appointing State officers in the Governor alone. The duty would not often be discharged without the seeking of good counsel."

and unity of effort are here desirable." The Governor's power to force legislation is strengthened by his right to call a special session which most of the constitutions provide. Only those subjects mentioned in the call may be considered by the legislature. In this way Governor Fielder forced the adoption of a reform in the methods of selecting jurors in New Jersey and Governor Hughes of New York compelled the passage of a law against race-track gambling.

**The Veto.**—The veto is especially important in State government because of the usual excess of appropriations over revenues, which makes it necessary for the Governor to cut off by veto the surplus expenses. The members of the legislature are so harassed by various interests among their constituency, demanding appropriations, that they are afraid to refuse the demands lest they make themselves unpopular. They accordingly vote appropriations for hospitals, homes, dispensaries,<sup>1</sup> etc., etc., until they have approved expenditures enough to swamp the State treasury with a deficit, provided the Governor signs the bills. The pressure on the members to continue this practice is almost irresistible and on the other side they cannot increase the tax rate to cover these increased expenditures without incurring serious unpopularity. What shall be done? Too often the answer is, "Put it up to the Governor," and the bills are rushed through *en masse*. The Governor must then assume the painful duty of vetoing the excess appropriations. Recent legislative sessions in several States have granted appropriations \$20,000,000 in excess of the revenues, all of which had to be cut down by the Executive. The Governor may veto an entire bill, but in most States he has also the constitutional right to veto particular items in an appropriation, or to reduce such items, and by using this important power he may cut down the amount for each object to a point within the revenues of the State. Much of the Governor's time is taken up with hearings on legislative bills.

**Power of Removal.**—The right to remove officials is even more important than that of appointment as far as the Governor's control over his subordinates is concerned. Few of the State constitutions grant this power in clear and satisfactory terms. Usually the Governor is permitted by custom to discharge from office for misconduct or neglect, any official whom he has the power to appoint, but in practice the political conditions are such that the power is seldom employed. Since appointments have been made at the behest of the party leader, it would be insubordination on the Governor's part to dismiss from office the men so chosen. When an executive of independent views enters the office he finds that his power of removal is limited on three sides—(a) some of the most important offices, as we have seen, are elected and these are not subject to his removal; (b) the appointments require Senatorial approval and if he ousts an insubordinate official he cannot appoint

<sup>1</sup> See the Sections on Charities and Correction.

a successor because the Senate, under the direction of the party leader, will refuse its approval; (c) the immense number of local officials in the counties, cities and townships are entirely exempt from his influence. A few States, such as Illinois and New York, have provided that the Governor may remove county sheriffs and district attorneys for cause after a public hearing but this is the exception rather than the rule. Many State constitutions also contain the harmless but useless provision that the Governor may, upon address by the State legislature, removed any State official. The value of such a clause is about equal to that of impeachment. Since the public interest lies in strengthening the Governor's hands in any contest which he may enter for the control of the State administration, it would seem wise to increase his power of removal and to extend it even over many of the elected officers in the municipalities with a proviso that such removal must be for cause and after a public hearing. If we brush aside the reasoning of the ultra-partisan and the extreme reformer, we must concede that it is as important that an officer be efficient as it is that he be honest. The mere placing in office of a respectable citizen is by no means a guarantee that the work entrusted to him will be satisfactorily done. On the contrary, we have too often found that the "respectable" man, in office, is content to allow his office to be used for purely partisan purposes and to turn a deaf ear to the urgent needs of the people for the enforcement of the law. In such cases the chief executive of the State should have the power to reach down into the locality and grant relief from intolerable conditions. It is no satisfactory answer to local needs to say that the people constantly have it in their power to better conditions by action at the polls. Every official elected in our local governments has sworn to obey and enforce the law of his State, and, regardless of party organizations or factions, he should be compelled to do so under pain of dismissal. The "Governor's Recall" of disobedient and neglectful officers would offer a powerful means of establishing new standards of service in all grades of public office.

**General Executive Powers.**—As chief executive of the State, the Governor is required "to see that the laws are faithfully administered." He receives complaints from citizens, supervises the work of the heads of departments, represents the State in its relations with the other commonwealths and with the National Government. As a rule, however, he is unable to watch the various departments as closely as he should, because of the loose and unsystematic way in which the offices are grouped, and, unless an official is guilty of serious maladministration or dishonesty he is not apt to attract the unfavorable notice of the chief. In fact, the executive having made his appointments largely for political reasons, is apt to retain officials in their places for the same reasons, regardless of their efficiency, as we have seen, unless public attention is called to some serious abuse in the office concerned. Removals for inefficiency

... and offices which make up the chaos of State administration, he does possess one power which is often used to enforce the general regulative laws of the State; viz., the attorney-generalship. That official is usually personally and political association with the Governor and the prosecuting machinery of the central State government. In important conflicts between the State and the organized business regulation, his office can be used to enforce the law in a way as to command respect for the State administration. To-day enters such a conflict except as a lawyer, in this way the chief law officer of the State has become a member in length to the executive.

A peculiar feature of the Governor's executive duties is his membership in a number of the chief administrative bodies of the State; a large share of his time and attention is taken up by the work of these bodies. The reason for this custom is that the legislature, when regulating a new subject, may wish to avoid the additional expense incurred in a new office, and may prefer to assign duty to a number of existing officers acting as a committee. Almost invariably the Governor is made a member of every such body. One of our commonwealth executives has calculated that he might devote his entire time to the duties of the various bodies in which he was officially a member. Yet most of these bodies have important work to perform and the fact that the Governor is unable to be present shows that a new arrangement should be made and new departments created. Following are some of the bodies in which the Governor takes an active part when his other duties permit:

Board of Agriculture,

establish any harmonious organization between the newly established authorities, or to bring them into close relations with the chief executive. The most pressing, urgent needs were always satisfied by the simple creation of an office. The working out of a "system" was left to circumstances. We are now beginning to feel the need of some unity between the different parts. This shows itself in two features of our State administration:

1. The necessity of a systematic grouping of the offices in departments;
2. The need of a strong control by the Governor.

The lack of a systematic grouping of State offices has prevented successful management. In theory the Governor oversees all officials but in practice this is impossible. Modern governments are much like machinery, there is in each the same tendency to needless friction, the same necessity for accurate adjustment of the wearing parts, and even the same inert inclination to "run down" unless constantly impelled by that expansive force which in physics is called steam, in politics public opinion. But this force, to be effective, must be concentrated. It cannot be trivially or indiscriminately "squirted" at any or all parts of the governmental machine, causing them to work in unison; it must be guided and led along direct straight lines. This is the rightful function of the chief executive—he should represent the guiding force of public opinion, he must personify the people in their political feelings. If any part of the complicated structure is out of order, if any wheel is slowing down, then and there his influence should make itself felt. In order to do this, the administrative offices must be grouped and subordinated to each other as is done in any business organization. We are too prone to say that all depends on the personality of the chief, that if he is an energetic, capable and honest man, his spirit will in some measure dominate the whole administrative force, while if he is incapable, no amount of "system" will produce results. Such a statement is only half true, for a "system" is the means through which the influence of the chief makes itself steadily and regularly felt. Can we imagine the President of a great railway company appointing thousands of officials, all of them independent of each other, when by choosing a cabinet of six, and subordinating all the others to these, he can secure greater efficiency? The business plan of organization has its weaknesses, but it also has one indispensable feature of modern management—definite responsibility. We have completely ignored this principle in our State administration.

One hundred men may be necessary to govern a small community, but much depends upon the way in which this personnel is grouped. If the entire hundred are divided into ten separate groups each completely independent of the other and performing its duties regardless of the others, the administration of the community is doomed to failure. Nor is it otherwise with the State govern-

ments. With each decade the government of the commonwealth must respond to demands of greater scope and importance. To this end the Governor must stand in the same relation to the executive force of his State as does the President towards the Federal administration. This is possible only where the offices are so arranged that he may hold a few heads of departments responsible for the action of the entire force. But the Governors of some States are now charged with the appointment and direct supervision of thirty to fifty important, independent officers and boards, besides which some of the most prominent officials are elected by the people and are therefore not subordinate to the Governor at all. Under such a plan the Governor cannot control the State administration. His dilemma is increased by his abject dependence on the party leader, as we shall see. Yet a personnel two hundred times as great is directed by the President of the United States through the agency of ten responsible heads. There is never any doubt as to who is the real chief of the national administration.

Several of the commonwealths are now devoting serious attention to this problem. The Wisconsin board of public affairs has been authorized to examine in detail the powers of the various State offices to ascertain duplications and conflicts of authority and to recommend a regrouping and reorganization of State offices. Many proposals have been made looking toward the unifying and concentration of responsibility. The simplest and most effective plan would be to abandon the method of electing administrative officers and make them all appointive by the Governor; to reorganize the State offices under a few department heads as in the National Government, making these heads the Governor's cabinet. Such departments should be grouped to include every State office now in existence. For example:

State and internal affairs, including public works.

Justice.

Treasury, including all State finances and the supervision of banks, insurance companies, etc.

Manufacturing and commerce.

Labor, including arbitration, factory inspection and other labor matters.

Education, comprising public schools, universities, colleges, etc.

Public service, including public utility companies.

Agriculture.

Public safety, including health, State police, militia.

Charities and correction.

**Political Position of the Governor.**—If the Governor ruled his party he would be the strongest influence in the State, for the control of the party and of the government are inseparable; no one can be the real head of the latter unless he is also the party leader. Glancing over the principal States we find that only in the rarest

exceptions does the Governor occupy this position; almost invariably he is under the thumb of a great party chieftain who is "the power behind the throne" and who either prefers to occupy a seat in the United States Senate or not to hold office at all. This man *is* the State administration; all appointments are made after consultation with him, and he also determines which bills shall pass the State legislature. Naturally he prefers to place in the Governor's chair a person who will be agreeable to his wishes, who will consider the party interests and, especially, help to build up the leader's influence within the party. It is clear that a Governor who is young, ambitious and determined to seek power for himself is not desired by "the chief" who much prefers a man advanced in years, or of satisfied ambitions, and amiable qualities—in short, a man of the "honored citizen" type. Such was for many years the political position and influence of the State Executive—a nominal authority controlled by a "king maker," who was the real head of the State.

**The Struggle Between the Governor and the Party Leader.**—Into this peculiar political situation a new factor has entered in the shape of the demand for greater State activity. The first effect was apparently to strengthen the party leader; all classes of the people desiring legislation must first secure his consent and aid. But little by little the desired laws are being enacted and it is now seen that their efficacy depends on the executive. The Governor springs into greater prominence after every legislative attempt at regulation; with the adoption of factory, health, pure food, corporation laws, and a host of other measures his nominal power increases, until a point is reached where he can no longer withstand the temptation to assert some slight degree of independence and feel himself indeed, as in name, the chief executive. If he is a strong man, or a consummate politician, or if the conditions of the moment prove especially favorable, he subordinates the State executive offices, one after the other, to his own control, and even reaches out towards the legislature to form a mutual understanding or alliance with the party leaders; in short, to become the real head of his party. In all this long struggle he is opposed by the forces of the old party system and supported by the strength of popular demands for government efficiency. These demands are growing stronger but they are still unsteady and spasmodic; the struggle results now in favor of the executive, now in favor of the old leaders. In spite of temporary set-backs, the conflict is gradually coming out into the open, and the real power tends to pass slowly into the hands of the Governor. This is the significance of the constant turmoil and political unrest in our commonwealth administration; we are evolving a responsible form of State government.

**Military.**—The Governor is Commander in Chief of the State militia and appoints the commanding officers, the Adjutant General and a staff of aides, whose duties as a rule are not onerous.



He may order out any portion of the State militia or national guard which is required to maintain order in any district. The request for troops is usually made by the Sheriff of the county, although the Governor may act without such a request. Some of the commonwealths have also established a force of State police to avoid delays, expense and political antagonisms incident to calling out the militia; the officers of the police are in such cases chosen by the Governor and the force is under his orders.

**A State Police.**—Pennsylvania, by Act of May 2, 1905, has provided a State constabulary for this purpose. At the head is a superintendent of State police appointed for four years. His office is at the capitol and he is assisted by a deputy and a small office force. The superintendent appoints the members of the four companies or platoons, each with a captain, lieutenant, five sergeants and fifty men. Applicants are required to pass a physical and mental examination based on the rules of the police force of large cities. All the members are mounted. The force is distributed through the State in local headquarters, usually in the mining districts. Its members are given the usual authority of policemen to make arrests without warrants for violation of law which they witness and to serve and execute warrants issued by the proper authorities. They are also authorized to act as forest, fire and game wardens and are directed to co-operate with the local authorities in detecting crime, apprehending criminals and preserving order. The expenses are born by the State.

The results of this plan have been such as to commend it strongly to other commonwealths. The State police inspire respect, they are non-political, and their efficiency is far greater than either the militia or the local police forces.

The Governor may in most States suspend the writ of habeas corpus in times of disorder. By doing so he enables the militia to protect life and property and to avoid the many grounds on which judicial interference with military action may be invoked. Martial law, however, is only proclaimed for those sections immediately affected by hostilities and only so long as the hostilities exist. The State executive is loth to make use of this power because of the great unpopularity which it entails. For the same reason most of the sheriffs are unwilling to call for State troops, preferring to cope with riots and disorders by the aid of local police forces and posses.

**Judicial.**—The Governor possesses the power to pardon for offences against the State laws, in some States upon the recommendation of a board of pardons, which board is composed of heads of departments such as the Attorney General, Secretary, etc. Clemency extends only to offences against the State laws. The Governor also grants extradition of fugitive criminals and requests extradition from other State executives. Though the Federal Constitution, in Article IV, Section 2, Clause 2, requires the delivery of such

criminals by the authorities of the State to which they have fled, to the Governor of the State where the crime was committed, there is no way fixed by the Constitution to compel such delivery, consequently the extradition cannot be forced but is entirely a matter of courtesy between the two executives.<sup>1</sup>

In *Kentucky v. Dennison*, 24 Howard, 66; 1860, the above cited clause of the Constitution came to the Supreme Court for interpretation. A resident of Kentucky had assisted a slave to escape and had himself fled to Ohio. Such an act was a crime under the laws of Kentucky, and the Governor of that State accordingly demanded of Governor Dennison of Ohio that the fugitive be delivered up to the Kentucky authorities. The demand being refused, Kentucky brought suit against Dennison, as Governor of Ohio, and required him to deliver up the fugitive according to the Federal Constitution. In order to hasten the execution of Section 2 of Article 4, Congress had passed an Act in 1793 declaring "It shall be the duty of the executive authority of the State or Territory to which such person shall have fled, to cause him or her to be arrested and secured, and notice of the arrest to be given to the executive authority making such demands, or to the agent of such authority appointed to receive the fugitive to be delivered to such agent when he shall appear." These words in the Act, "it shall be the duty," the Supreme Court said in ordinary legislation, imply the assertion of the power to command and to coerce obedience. But looking to the subject-matter of this law, and the relations which the United States and the several States bear to each other, the court is of the opinion, the words 'It shall be the duty' were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution. The Act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose upon him duties of a character incompatible with the rank and dignity to which he was elevated by the State.

<sup>1</sup> "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

**"It is true that Congress may authorize a particular State officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced or punished for his refusal. And we are far from supposing, that in using the word 'duty' the statesmen who framed and passed the law, or the President who approved and signed it, intended to exercise a coercive power over State officers not warranted by the Constitution."**

This is a plain statement of the fact that there is no means to compel a State authority to grant extradition. The decision has been strictly followed since 1860, and in all too numerous instances the State executives have used their discretion in granting extradition even when such serious crimes as murder were involved. This practice points to a serious defect in our Constitutional law. There is no longer any reason why a criminal or a person accused of crime should be free from prosecution because of the unwillingness of an executive officer to deliver him to the proper authorities for trial. An enlargement of the Federal jurisdiction to cover such cases would inspire greater respect for the law.

**The Legislature.**—Probably no body of men in America exerts legal powers of such vital importance to the business community as those wielded by the State legislature. Our form of government makes the State the great reservoir of authority; the legislature therefore possesses practically every power which has not been forbidden in the State or National Constitution. Originally the State legislatures were looked upon with great favor and confidence by the people because they were the legitimate successors of those colonial assemblies which had so valiantly and faithfully protected the rights of the colonists. But the turnpike, canal and railroad companies which were floated in the first half of the 19th century persuaded many of the legislatures to guarantee dividends on the company stock. Other similar ventures and mistakes soon destroyed the popular confidence, and brought a strong reaction of distrust and suspicion against the legislature, which unfortunately continues with cause, to the present day. The real difficulty lies in the ease with which secret intrigues and deals may be consummated in the law-making bodies of the State, because of the large number of members and the methods of transacting and concealing the transaction of legislative business. In the bewildering mass of bills and resolutions and from the way in which they are shuffled like cards in a pack, it is impossible for the public to distinguish the good from the bad and unless a measure is conspicuously good or bad there is small chance of its attracting attention. The occupations, pursuits, and even the education and general training of the members are neither above nor below that of the people. This single fact, which has been pointed out by Professor Reinsch, in his excellent work on the American Legislatures, explodes two political theories, first, the belief of the fathers of the government that the legislative bodies of the commonwealths

would be composed of men far above the average in wisdom, judgment, discretion and qualities of leadership; and second, the modern critical thought that because of the inferior type of laws which are turned out by these bodies, they must be composed of the lower elements of the people. Neither of these assumptions is correct. In truth, as we shall see later, the vital essential need is for greater responsibility, and it is upon this principle that we must build, in order to strengthen our legislative bodies.

**Houses of the Legislature.**—The upper House or Senate usually consists of about fifty members while the lower or House of Representatives has from one hundred to two hundred members.<sup>1</sup> The qualifications for office and for voters are usually the same in both and even the term of office is sometimes identical.<sup>2</sup> The members are paid in most of the States, \$1,500 being the salary in New York and Pennsylvania. The regular sessions as a rule are held every two years and there is often a limit placed by the State constitution upon the length of the session. The purpose of this limit is to prevent the legislature from doing any more harm than is necessary but it has acted in the opposite direction in countless instances. Little legislation is enacted at the outset of any session because the bills have not yet been considered in committee nor have they been molded into form to secure legislative approval. The first half of the session usually goes by without any important legislation whatsoever. This means that if there is a sixty-day limit set by the Constitution, all action is taken in the last thirty days, so that in this brief period an immense mass of private and public bills are technically "considered" but really are rushed through both Houses, oftentimes under the suspension of the rules and without any knowledge by the members as to the real purpose and effect of the measures which they have passed. Like so many other constitutional limitations on the legislature the sixty or ninety-day clause has done more harm than good.

**Procedure.**—The procedure is modelled on that of Congress, but the control of the Speaker, floor leaders, and caucus over all bills and over the members themselves, is far more tyrannical than in Congress. This control is corruptly and flagrantly abused, because of the lack of public attention and understanding. In the obscurity of State procedure the manipulator finds his protection. The State party "organization" is even more intolerant of opposition than in

<sup>1</sup> Here is the weak spot in the legislatures. They are too large to be responsible. Delaware has the smallest Senate—15 members; Minnesota the largest—63. New Hampshire is able to get along with 24 Senators but has 402 members in the lower House! New York, Pennsylvania and Illinois have 50 or 51 in the Senate and 150 (N. Y.) to 207 (Pa.) in the House. There is no need either for the two Houses or for a large number of members in any State.

<sup>2</sup> In many of the States it is customary to have the Senate term double that of the House. In New York where there are annual sessions the House is elected for one year, the Senate for two; in most of the other commonwealths the terms are two and four years respectively.

the national body; it ignores the rules, or changes or violates them at will, and its officers and committeemen in control of the legislature use their powers directly and openly in favor of the leaders whom they represent. Measures which lack a majority vote are declared "passed," words and whole clauses are added to or dropped from bills, after they have been passed, by clerical "mistakes." The courts take the ground that such changes are validated by the signatures of the presiding officers attesting the passage of the bills. Committee meetings are called suddenly or when the opposition are not present, bills are smothered in committee or "lost" and the whole gamut of trickery and chicanery is run in the attempt to block and thwart popular measures opposed by the "organization" and to force through laws in behalf of some private interest. The members of the legislature may fairly represent the average honesty and intelligence of the people, but without the stimulus of individual responsibility and public attention we cannot expect them to enact laws of a high standard nor to withstand the pressure of powerful special interests.

**Restrictions on Legislative Powers.**—The recklessness of party control of the legislature has led all the States to impose an extensive series of limits and restrictions on legislative powers and procedure:

(a) The strict prohibition of special legislation where a general Act will cover the subject, and a detailed setting forth of the kinds of special and local laws which may be passed.<sup>1</sup>

(b) The enactment in the Constitution itself of much ordinary legislation on important subjects, such as corporations, local option, public service utilities, etc.

(c) Every bill must relate to one subject only, which must be clearly expressed in the title of the bill. The purpose of this provision is to block the practice formerly prevalent of attaching snake clauses and riders to meritorious provisions with which they were in no way connected. The friends of the meritorious measure were then obliged to defeat their own bill or to accept the obnoxious amendments dealing with other subjects.

(d) A majority of the members elected to each House, not a simple majority of those present, must vote in favor of a bill to insure its passage.

(e) On finance bills involving appropriations or taxation, two-thirds of the members elected must approve.

(f) On the final reading of a measure the "ayes" and "noes" must be entered in the journal.

(g) In all except six of the States the legislature is allowed to meet only once in two years except at the call of the Governor.

Yet these severe constitutional restrictions have not prevented the legislature from sacrificing public welfare to special interest

<sup>1</sup> Prof. Reinsch mentions the interesting fact that in California and Ohio the constitutions specify *over thirty subjects* on which special laws may not be enacted. *American Legislatures*, p. 150.

when occasion demanded nor have they served to re-establish that body in the confidence of the people. Popular distrust continues and has shown itself in the movement towards direct legislation and towards a complete reorganization of the legislature itself. We shall consider these movements in later chapters.

In the Governor's conference of 1913 the Governor of Arizona pointed out some of the ways in which legislative inefficiency to-day blocks the carrying out of the popular will and enables a small group of well-organized interests to divert attention towards irrelevant bills. He also showed the paralyzing effect which this has upon the executive.<sup>1</sup> Meanwhile strong efforts have been made to improve the quality of legislation by placing at the disposal of the legislator more complete information both as to subject-matter and the form of laws.

**Legislative Reference Department.**—One of our prominent national traits is that we feel competent to give an off-hand opinion on any subject connected with government, no matter how technical or far removed from our sphere of knowledge the question may be. This quality has caused us much discomfort in State law-making and has deprived our governments of the expert services which all private businesses enjoy. No private company would dream of

<sup>1</sup> "One of the strongest hopes of a Governor when he assumes office is that he will have the good fortune to work in harmony with the legislature. His mind is open to welcome every opportunity for team work, and at the same time the purpose is strong within him to carry out whatever reforms or plans the people may have ordered at the polls. If the legislature proves to be inefficient under the test, there is trouble and confusion, which do not exactly reflect credit upon representative government. Because we are Governors and are held directly responsible to the people, this break or defect in the machinery is brought closely home to us; for no Governor can be unmindful of a situation which often places him in a false light before the people and seems to hold him to account for things over which he really has no control. If the inefficiency of legislatures could be popularly recognized for exactly what it is—if it did not tend to draw an entire State administration into disfavor—the chief executives would no doubt feel less concerned over possible damage to the cause of good government and more hopeful of the speedy and effective application of the remedy. But, unfortunately, this is not the situation. An inefficient legislature is the tarred stick of State government, doing more or less damage to all who come in contact with it in an official way.

"As a rule the longer a legislature is in session, or the membership is subject to call in special session, with long periods intervening, the less efficient it becomes from the standpoint of the public service. The explanation is not difficult. The people, having elected the legislature and defined its duties, are likely to forget, or take it for granted that orders once given will stand as a guide for legislative action in any direction. But the interests never forget or take anything for granted. They are always at work, stirring up strife, creating divisions among the majority, and holding out promise of a political reward to factions. This increasing labor, both during a session and between sessions, the steady attack upon officers who remain true to their pledges, the creation of false issues as a means of attack upon real, but hidden, issues, serve to make the legislature dull to the pressure of popular influence or power. The inefficient legislature takes it for granted that the people have forgotten, or no longer care, and that political reward can come only through these interests hovering around the legislative elbow."

entrusting its funds or its operations to a department head unless he were a highly trained, technically proficient expert who had by education or experience qualified himself thoroughly for his work. But the State constantly entrusts its duties to the bungling ignoramus whose sole qualification is that he means well or that he worked for the ticket. As time passes we are growing out of this condition, but all of the State governments are still seriously weakened by it, and nowhere does it show more plainly and with greater disadvantages than in the partisan legislator. The suspicion is beginning to dawn that we are not all born legislators. A large majority of those chosen to the law-making bodies are unfamiliar with the simplest and most important principles of law making. They are flattered into the belief that good intentions are sufficient to make good laws. What is therefore their surprise when they find that a measure of undoubted merit which they have introduced and passed, may be unconstitutional for not one but several reasons, and that even if upheld by the courts it would not achieve the end that they had in mind, but would perhaps defeat their very purpose! Yet this is a common discovery by both professional politician and reformer. It is only another instance of that impressive fact that in legislation as in science and in business, we have reached the era of "instruments of precision." We need the benefit of every technical aid that we can secure.

No legislature should try to be its own lawyer. "He who pleads his own case has a fool for a client," is an ancient English saying, that aptly fits our law making. We need the service of the legislative expert in drafting measures. Upon this thought as a basis, the legislature of Wisconsin established a Legislative Reference Department in 1901. The State University furnished an expert, Dr. Charles McCarthy, who has built up in his Department a complete collection of information and material useful for perfecting the form of legislation, which are all at the service of the members without charge. The Department observes the following rules:—

(a) Bills are drafted only on the specific written request of a member of the legislature over his signature.

(b) No suggestions as to the substance of bills are made by the department or its draftsmen—the department's work is only clerical and technical.

(c) The department itself is not responsible for the constitutionality nor legality of any measure, although its work necessarily obviates most of the evils of illegality that beset the average bill. The department is non-political and non-partisan; it places its trained experts at the disposal of all factions and members in the legislature.

Dr. McCarthy has found from experience that legislatures have not the time to read elaborate text books nor scientific works in detail,—they "have practical aids in their legislative work,

short cuts, summaries, references, files, card indices, etc. Accordingly the department prepares from a list of bills which were introduced in the previous legislature, a new list of probable topics for the next session, and on these topics it obtains collections of the laws of other States, of foreign countries, of the National Government, court decisions as to their validity, newspaper clippings, magazine articles, reference books, government reports, and a list of bills on the same subject previously introduced, a record of governors' vetoes, governors' messages, platforms of political parties, etc. The department is not only a ready-reference library, but also an ideal laboratory in which to prepare new measures. The State laws are no longer crude, bungling measures, based on honest purpose or good intention, but are better prepared technically to achieve the aims of their framers. The technique of bill drafting has been conquered and placed at the disposal of all who will avail themselves. So successful has the plan proven that the other States are rapidly following Wisconsin's lead. A step further has been taken by the establishment of a privately supported legislative reference bureau in New York City, which has recently affiliated with Columbia University. This bureau lays emphasis not only upon the technique of bill drafting, but also upon the most modern principles and aims of legislation, so that measures prepared with its aid enjoy a double advantage. Such a bureau in the nature of things cannot be managed by any State but must be unofficial in its activity. If adequately supported and backed by financial resources commensurate with its importance and public services, such an agency would transform our State legislation both as to technical quality and effectiveness of policy, within a decade. Dr. McCarthy points out that we need in our universities and especially our law schools, a further aid for the State government in the form of some co-operative system, by which the State official as well as the law student may be familiarized with (a) the laws upon a given subject, (b) the Court decisions, and (c) the administrative results of the execution of the law. Intelligent law making means knowing not only the statute passed by a legislature, but also the way in which this statute has been interpreted by the courts and its exact meaning defined, and finally the practical effects which the administration of the law by the executive officials, has shown. A survey of any one or even any two of these three does not give such a knowledge of law as is required by the law maker or the lawyer. We need a thorough knowledge of all three sides of this problem, co-ordinated by methods which only our universities are fitted to provide. The law school, the economic and political science departments of the universities and the State legislative reference bureau, must co-operate with the expert executive officers to accumulate this knowledge and make it available.

Wisconsin has also attempted to improve the technical quality



of her legislation by creating a Revision Committee with an expert force appointed under civil service rules to search all bills for technical errors. Measures are checked at every stage of their passage from the legislature by the clerks of this Committee. In this way a number of mistakes which occur in the printing and preparation of measures are avoided with great advantage to the quality of the legislative product. The State has also provided a statute reviser who issues an annual volume revising the statutes and bringing them up-to-date.

**The Lobby.**—All the legislatures are beset by agents of organized interests working either to accomplish or prevent the passage of bills affecting their clients. This has become a serious problem and at all times a grave menace to the public welfare. The legislature is in position to grant such favors, privileges and advantages, to a few, under the ostensible cover of beneficent legislation, that its action is of vital interest to every man in the community. Yet it is all too true that the bodies are forced to act in response to the demands not of the community, but of the most compactly organized elements in the community. The secret of influence upon the legislature is organization. Those elements of the people who are unorganized count for little or nothing. The lobbyist is the agent of an organization. His work is not done in the open but by concealed intrigue. He "sees" leaders; he confers with them, and makes friends with committeemen, he is a steady, insistent and secret force prepared to take advantage of all those factional eddies and whirls of party organization, which constantly recur in State politics. Some of the States, again led by Wisconsin, have attempted to cope with this problem by requiring registration of all lobbyists with the names of the companies that they represent. The register is open to public inspection. The law provides that their work for their clients must be done in the open, that is, in public committee hearings. It is the testimony of those on the ground that this requirement has practically exterminated the grosser forms of corrupt and flagrant solicitation and influencing of members that was formerly the order of the day.

**Commission Government for the States.**—The belief that the State legislatures are not properly organized to carry out the vast burden of new duties and services which they are now attempting to perform, has grown so strong that serious attention is now devoted to their reorganization. All the plans proposed contemplate a material reduction in the number of members in the legislature, the most practical suggestions being those made by Governor George H. Hodges of Kansas, and the Citizens' Committee of Oregon. The main points in Governor Hodges' plan are given in a special message of March 10, 1913, from which the following quotations are chosen:—

"In common with a large and growing number of thoughtful people I am persuaded that the instrumentalities for legislation

provided for in our state constitution have become antiquated and inefficient. Our system is fashioned after the English parliament, with its two houses based upon the distinction between the nobility and the common people, each House representing the diverse interests of these classes. No such reason exists in this State for a dual legislative system, and even in England at the present time the dual system has been practically abandoned and the upper House shorn of its importance, and I believe that we should now concern ourselves in devising a system for legislating that will give us more efficiency and quicker response to the demands of our economic and social conditions and to the will of the people. I have been led to this conclusion by an experience of eight years as a member of the Senate of this State and my convictions on this subject are by no means of recent date.

"You senators and representatives cannot but have observed the defects of our present system. In a short session of 50 days you are required to study and pass upon hundreds of measures, and the hurry with which this must be done must of necessity result in a number of more or less crude and ill-digested laws, which often puzzle learned jurists to interpret with anything like satisfaction to themselves or to the public. Hundreds of measures also, embodying important legislation, die on the calendar every two years. After a brief session, the Legislature adjourns, and the business of one co-ordinate branch of the State government is absolutely abandoned for a whole biennium, unless the Legislature is convoked in an expensive extraordinary session by the governor. It is as if the head of an important department of some big business should give only fifty days every two years to its management.

"I am aware of the veneration with which ancient institutions are regarded in some quarters, but I see no reason why we should cling to these institutions in carrying on the all-important affairs of the State, when in almost every other activity of life we are discarding old traditions and antiquated methods for newer and progressive ideas and more efficient and economic methods. The Legislature has itself discarded the antiquated and inefficient methods of managing the business of our State institutions and has concentrated the responsibility in the hands of a few instead of many boards—in a word, has applied to them the principle of government by commission. We have recognized in this State also that the old methods of city government are expensive, inefficient and unsatisfactory, and everywhere the commission plan of city government is being adopted, and in almost every case is yielding high-class results.

"For myself, I can see no good reason why this new idea of government by commission should not be adopted for the transaction of the business of the State. Two years ago I suggested a single legislative assembly of thirty members from thirty legislative districts. I am now inclined to believe that this number is too large and that a legislative assembly of one, or at most two, from each Congressional

district would be amply large. My judgment is that the governor should be ex officio a member and presiding officer of this assembly, and that it should be permitted to meet in such frequent and regular or adjourned sessions as the exigencies of the public business demand; that their terms of office be for four or six years, and that they be paid salaries sufficient to justify them in devoting their entire time to the public business. Such a legislative assembly would not, I believe, be more expensive than our present system. It would centralize responsibility and accountability, and under the check of the recall would be quickly responsive to the wishes of the people.

"Our present system has been in vogue since Kansas became a State, more than fifty years ago, and in that time we have seen the most remarkable changes in sociological and economic conditions take place. No private business now uses the methods of fifty years ago. In every activity of modern life new and progressive methods have been adopted. By progressive I do not mean any visionary scheme of government, but the exercise of that sane, sober and wise judgment which is always ready to throw away antiquated machinery and methods and adopt the latest, most efficient, most beneficent and most economical instrumentalities for accomplishing the greatest good, whether it be in public or in private affairs.

"Is there any good reason why political institutions should not change with the changing demands of modern social and economic conditions? I believe not. The leaven of this new idea of modern business methods for modern public business has taken root in the public mind. The people are everywhere talking it over, and I am one of those who believe that the people can be trusted to reach correct conclusions about their own public business when they are given adequate opportunity to study and discuss any subject.

"I am not asking at this time that any legislative action be taken on this subject, but am calling your attention to this subject now that you may carry back to your people the idea herein expressed and talk it over with them for the next two years, to the end that when you come back to these halls at that time you may know and be of a mind to execute the will of the people of this State on this subject."

**The Oregon Plan.**—The most advanced and in many respects, the most practical of the proposals made for improvement of the State legislature is that suggested by the "People's Power League" of Oregon, the main features of which are:

First, to abolish the direct primary and place in its stead a system of preferential voting for the governor; this would do away with the need of a primary and allow every voter to express his first, second and third choices on his ballot;

Second, to establish a State budget in which the governor can fix a maximum for each item;

Third, to elect the members of the legislature by a system of proportional representation;

Fourth, to reduce the number of members of the legislature and establish a single house.

Fifth, to make all administrative officers appointive by the governor.

Sixth, to give the governor and members of his cabinet a seat and a vote in the legislature.

Seventh, to retain the popular initiative and referendum and establish a recall of all executive and legislative officials and representatives both appointive and elective. The Oregon plan is being widely discussed in many circles of people and seems to offer the most promising and safest model on which to form our State governments in the future because it retains the substance of our representative institutions while also concentrating power and responsibility to a reasonable extent and, what is most important, simplifying the whole organization of the State.

**State Courts.**—The usual organization of the State judiciary commencing at the bottom is:

The magistrate or justice of the peace,

In the cities, municipal courts,

County courts, both civil and criminal jurisdiction,

A Superior Court,—in the larger States,

A Supreme Court or Court of Appeals.

In most States the judges hold office for ten year periods in the lower courts, and for longer terms in the higher. The Supreme Court tenures vary from two years in Vermont to 21 years in Pennsylvania. No general agreement has been reached by the States in their customs of choosing the judges. The most usual methods are election, or appointment by the governor,<sup>1</sup> and of these the choice by appointment seems more desirable,—first, because of its simplicity, enabling the people to divest the election of confusing issues and personalities and concentrate under the short ballot principle on the fewest number of offices. Second, because the method of election is in reality an appointment by the political leader of the majority party in the State. A majority nomination means election, and no one can secure this nomination without the O. K. of the leader. For these reasons it seems wise to fix more definitely the responsibility for the choice by giving it to a public official, the Governor, rather than to a less visible and less responsible influence. This plan has proven successful in New Jersey and other States. In most of the States, the nomination of an elective judge in the higher courts is made under the control of the political elements which run the other departments of the State government. Owing to these and other causes it has not been possible for the judiciary to remain free from political influences. Such influence shows itself even in the appointment of court officers. A judge cannot be removed from office during

<sup>1</sup> The method practiced in a few of the States, of election by the legislature is least desirable of all for the reasons which are obvious from what has already been said of the legislative procedure.

his term except by impeachment or in the inferior courts by the Governor upon a request from the State legislature. Such a removal is almost unknown in recent times.

In the last twenty years many of the States have created special courts for peculiar classes of litigation. The large cities have established municipal courts, the purpose of which is to hear small cases, both civil and criminal. The ordinary county courts are so overburdened that the small debtor can usually escape his obligations by the simple means of delay and the attendant expense to the plaintiff. By relegating these small claims to a special court with simple procedure, the plaintiff secures more adequate justice at less expense. A similar change has taken place in criminal suits. Formerly it was the custom to hear all criminal cases together, the accused being herded in the lockup, regardless of their age or experience in crime. Special courts have now been created for women and young persons, the result being that those who are just entering a criminal life are treated with greater consideration and care and do not form those associations which are so often the cause of permanent delinquency; the Juvenile Court is now a well-established feature of every advanced city judiciary. And, through the efforts of the judges and the probation officers connected with the courts, a large proportion of the young persons brought before the tribunal are saved from becoming a complete loss to the community.

**Execution of Decisions.**—The Sheriff is the executive officer of the local county courts and if opposed by force he has power to enroll as his assistants such a number of citizens as he may require to carry out the court decree, by forming what is known as a posse. If this is unsuccessful he may call upon the Governor for the militia and the Governor, if unable to cope with the disorder, may invoke the aid of the United States by a direct request to the President, as provided in Article 4 of the Constitution. The Sheriff also exposes for sale under orders of the court, the goods and property of debtors, and carries out important duties in apprehending and imprisoning criminals, under orders of the courts.

**The Prosecuting Officer.**—The position of the district attorney is a strategic one in the judicial system of every community. He is the public prosecutor in criminal cases; under the peculiar traditions of our American law, he may wait until a formal complaint is brought to his attention, or, of his own initiative he may start proceedings against officers, using the powers of his office and of the courts to secure the necessary testimony. In this way, a prosecutor may be either supine or active. He may wait for complaints to be made or he may conduct his own vigil over the laws of his city and State. As a rule, the district attorney is inactive and takes it for granted that if the law is violated some one will be injured and will complain. Such an officer usually conducts his prosecutions from the routine evidence produced by the police department. Occasionally, however, there steps into office a man of different type who

disregards the purely political aspects of his post and conducts it in an aggressive manner. It would be physically impossible for him to insist on the vigorous prosecution of all offences, nor would such a course tend to the best interests of the community. He therefore selects a limited number of important cases, regardless of the police reports and often gathers the evidence through his own agents<sup>1</sup> and prosecutes on his own initiative without waiting for complaint. Such men have inevitably won great prestige or advancement because of their stand; and many of them have established a national reputation and have received high public office. Among such may be mentioned William T. Jerome of New York City, Joseph W. Folk of St. Louis, Charles S. Whitman of New York, Francis J. Heney, and numerous others.

Cases are formally recorded for prosecution in the district attorney's office, after an indictment has been found before a grand jury. It is not necessary as popularly supposed, that the district attorney must prosecute all indicted persons to the utmost limit of the law, regardless of his belief in their innocence or otherwise. It is his duty, as repeatedly established in court, to ascertain the guilt or innocence of persons and act accordingly, regardless of the indictment. It is now also well established that he may legitimately abandon many cases on his docket where the ends of justice would not be served by a continuance of prosecution. Among the many types of cases which fill the dockets of the district attorney's office in every city and are properly cleared away without prosecution, are the minor offences in domestic relations, cancelled after a reconciliation is effected, innumerable assault and battery cases which are similarly patched up, etc., but along with these are others of a graver nature which should not be dropped but are often abandoned for reasons which the public would not approve. Among these latter are prosecutions of fraudulent debtors; too often the creditor accepts a compromise and agrees to ask the district attorney to cease criminal proceedings; election fraud cases are quite usually allowed to fall by the wayside unless pushed by some vigorous citizens' league, and in general the petty thievery and thuggery practiced by the submerged portion of the dominant "organization," in municipal politics.

**Judicial Safeguards.**—In all criminal cases and civil suits above a certain value, usually \$15 or \$20, a jury trial is required by the State constitution. Before a person can be tried for a crime, an "indictment" or formal accusation must be drawn up and approved or found to be a "true bill" by a grand jury; this body is usually composed of 24 members who ascertain whether there is sufficient probable cause for the detention and trial of the accused. In our early history the people were much concerned to prevent the prosecution and punishment of innocent persons and accordingly all attention was focussed on the safeguards to be thrown around

<sup>1</sup>The district attorney is usually authorized to employ a small number of detectives independently of the city force.

the accused. But the accused has been so thoroughly protected that under our changed conditions he stands more than an even chance of escape and there is a growing sentiment in favor of protecting society from the criminal by removing some of these technicalities of procedure.

There are so many of these safeguards and technicalities that it is often an easy matter for a skillful attorney to secure an acquittal or a light punishment for men who are undoubtedly guilty of the most heinous crimes. The common methods of doing this are to claim any of the following:

The indictment or accusation found by the grand jury does not clearly state the crime; or

It does not state that the act is forbidden by law; or

The law itself is not sufficiently clear as to the exact criminal act which is to be punished; or

The indictment mis-names or wrongly names the person accused; or

The crime was committed more than two years ago and the accused is therefore freed under the Statute of Limitations; or

That in the trial itself the rights of the accused were violated by trying him in a heated state of public opinion; or

By allowing certain evidence against him to be produced which should not have been admitted, or

By refusing certain evidence in his favor, or

By the Judge's decision on certain matters of fact which should have been left to the Jury to decide; or by the partiality of the Judge's charge, etc., etc.

If any of these or of a thousand other claims is allowed, the prisoner escapes or secures a new trial, no matter how perverted or dangerous he may be nor how abominable may have been his crime. On the other hand, a poor or ignorant person, weakly defended by an incompetent attorney, may be and often is heavily dealt with regardless of the nature of his offence. The safeguards of our criminal procedure originally designed to protect the lowly against the great power of a royal government, are now a convenient and easy means of escape for the cunning, rich and unscrupulous evil doer, while the poor and ignorant are too often unprotected. So far has this dangerous condition developed that it is now well described in the cynical aphorism,—“It's not safe to steal less than a million.” The progressive elements in the legal profession are attempting to remedy this condition by two important changes:

1. A less technical, literal interpretation of the law in order that no conviction or trial shall be set aside unless a real and substantial violation of the principles of legal procedure has taken place.

2. A much more important and active part should be taken by the Judge. He should *conduct* the trial. At present he is not a Judge in any serious sense but a moderator who merely tries to

insure fair play for both sides in the battle of words, occasionally being called on to interpret the rules of the game. So long as our Judges occupy this position of referee it is impossible to avoid the perversion of justice already described; there must be a willingness on their part to participate actively in the trial and to assume full responsibility for its successful conclusion. Such an attitude on their part would at once put an end to the continuous bickerings between counsel which are now so common, and would shorten the proceedings and reduce the cost of both civil and criminal suits. These changes are not based on theoretical principles of law but have long been practiced in the English and Continental courts where justice is dispensed quickly, without useless technicality, and far more fully and cheaply than in our own country.

Former Judge Baldwin, in his *American Judiciary*, accounts for the law's delays chiefly on the grounds that the judge has less power to expedite trials in the United States than in most countries; the many reasons for which an appeal may be granted from the decision of the lower courts and the overcrowding of the appellate docket of the higher courts; the extreme to which we have gone in guaranteeing a jury trial with its delays, to all civil and criminal cases; the fact that American lawyers prepare and try their own cases in court and are therefore not as expert nor as quick in procedure as are the foreign lawyers, who are either solicitors preparing cases exclusively, or barristers, trying cases exclusively,—the barrister is a specialist in court trials, whose standing and income depend upon the large number of cases which he argues; the American custom of stating the grounds of a case in broad, general terms and making supplementary motions, corrections, and additions after the case has come to trial, thereby taking up many needless hours and even days of the time of the court.

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#### QUESTIONS

1. Why has the Governor been given such a weak position by the State constitution and laws?
2. Mention the more important officials of State administration.
3. Which of these are elected and which appointed by the Governor in your State?
4. How is the Governor nominated in your State?
5. What are the qualifications of the Governor?
6. Give some idea of the terms of office common in different States. Is a long or a short term more desirable? Reasons.
7. Give some idea of the salaries paid by different States.



8. What are the Governor's most important powers?
9. Explain the method of making appointments.
10. What are your impressions as to the advantages and disadvantages of senatorial approval of appointments?
11. A new Governor elected on a platform favoring certain new laws finds a strongly organized opposition entrenched in the legislature. What steps can he take in the impending struggle to carry out the platform pledges?
12. Why does the Governor so often make use of the veto power?
13. Prepare a brief summary of the extent of the Governor's power of removal in your State and discuss the advisability of extending this power, including a statement of the offices to which it should be extended.
14. Why is it difficult, if not impossible, for the Governor to supervise and direct the State administration as the President does in the National Government?
15. Why has the Governor been made a member of so many boards? Can he attend to the duties of these boards?
16. How could the Governor's supervision and control of the administration be increased?
17. Outline briefly the causes of the dependence of the Governor upon the party leader of the State.
18. Why is a young, ambitious man as a rule not favored by the leader for the governorship?
19. Explain the forces, and the clauses of the Constitution which favor each side in a conflict between the governor and the party leader.
20. Outline the military powers of the Governor.
21. Explain the writ of habeas corpus and the effect of its suspension by the Governor.
22. What are the Governor's powers in cases of extradition? What are his duties under the National Constitution?
23. If the Governor of your State refused a request for extradition by another State, what could the authorities of the other State do?

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#### QUESTIONS

1. Outline the main features of State legislative organization and explain its similarity to that of Congress.
2. Does the majority party have a greater or less control of the State legislature than has the majority in Congress? Give some examples of its powers.
3. How would you explain the fact that unpopular and even crooked measures have so much better opportunity to pass in the State legislature than in Congress?
4. Why has public confidence in the State legislature been lost?
5. Prepare a brief essay, showing the attempts made in State constitutions to limit the powers of the legislature, to govern its procedure and to prevent it from doing harm to the interests of the State.
6. How would you answer the argument that the legislature is composed of the lower classes?

7. What do you consider the strongest need of the legislature in order to rehabilitate it in public confidence?
8. Give some idea of the size of the two Houses, with example.
9. How large are the Senate and the House in your State?
10. Is the session of your legislature limited in time? Reasons.
11. Get the opinion of an experienced newspaper man on the advantages and disadvantages of a time limit.
12. Outline briefly the views of Governor Hunt of Arizona on the relations between the Governor and the legislature.
13. Explain the need and work of a legislative reference bureau.
14. Have you such a bureau in your State? What are your impressions as to the advantages for your State?
15. Explain the work of the Wisconsin revision committee and its effects on the quality of legislation.
16. What is a lobby and why is it necessary?
17. Summarize some of the evils which have arisen from the lobby and the way in which the States have coped with this question.
18. How does the number of members affect the trustworthiness and efficiency of the legislature?
19. Explain Governor Hodges' suggestion on this point and summarize his reasons.
20. Give your own impressions of his plan.
21. What are the proposals of the Oregon citizens committee and give your impressions of their value.
22. Prepare an essay on responsibility and efficiency in the State legislature and the means of securing them.
23. Explain the system of Courts in your State.
24. How do the tenures of the judges vary from those of other officers? Examples.
25. How are the judges chosen in your State?
26. Mention some other methods and give your impressions as to which is the better and why.
27. Why have special courts been so frequently established in recent years?
28. Has the plan been a success or failure? Examples.
29. Explain the general position and powers of the sheriff in the Court system of your State.
30. Outline the main duties of the district attorney and show why he occasionally becomes a popular hero in the political strife of the city or county.
31. Why does the district attorney abandon or drop so many indictments?
32. Outline the more important judicial safeguards thrown around the accused in criminal trials.
33. Give your impressions as to the effect of these safeguards in aiding or hindering a reasonable administration of justice.
34. How is it proposed to remedy these difficulties?
35. What are the causes of delay in civil suits?

## CHAPTER XVIII

### THE STATE AND ITS WORK— BUSINESS PROTECTION AND REGULATION

THE question "What is the State doing for its people?" is so much more important than the forms, the methods and the machinery of its government that we must devote the larger share of our attention to the *work* of the State. In examining this activity we shall concentrate upon certain fields which are of special interest. These are:

Business Protection and Regulation,  
Health,  
Education,  
Labor Interests,  
Highways,  
Charities and Correction.

In each of these departments of work, recent years have seen the rise of new and important problems for which the State governments are now seeking a solution. For greater convenience the recent interpretation by the courts of the State's constitutional authority over each of these fields is given in the Chapters on Constitutional Protection of Business, and The Police Power.

**Business Protection and Regulation.**—The regulation of our business companies has usually been undertaken in order to protect the consumer, the investor, and often to protect the companies themselves, as producers. Regulation has run along the following main lines:—(a) The grant of charters of incorporation, and the issuance of permits to companies from outside, to transact business within the State; (b) The special supervision and control over banking, insurance and similar fiduciary businesses; (c) The regulation of charges, services and accounts of railways, common carriers and public service corporations; (d) The attempts to maintain fair conditions of trade and competition.

(a) **Charters.**—In the grant of charters, our States have established some executive office, usually the Secretary of the State, where, upon compliance with the general laws, the incorporators of a new company may secure a charter. As a fee or tax is usually charged for this purpose, certain Commonwealths have fallen into the practice of bidding for this "trade" by reducing their requirements, except the fee, to a practical nonentity, in this way attracting to their capitals the lucrative business of chartering corporations on a wholesale plan. Delaware, West Virginia and until 1913 New

Jersey have freed themselves of much of the burden of ordinary State taxation by this practice. A charter once secured in one State, the company may transact business in others upon complying with their general laws.

The usual requirements necessary for obtaining a charter include a statement of the purposes, name, amount of capital, plan of organization and names of incorporators of the new company besides the payment of a fee to the State. For certain financial companies such as banks, insurance companies, etc., additional safeguards are required. Most of the requirements are purely formal and the State officials may not exercise their discretion in granting or withholding a charter but are usually obliged to make the grant as soon as the necessary qualifications have been fulfilled. The charter is the constitution of a corporation, outlining the purposes of the company, the authorities by which it is to be managed, the rights and duties of its "citizens" or stockholders. In all of our States a charter may be forfeited or cancelled if the corporation exceeds or abuses its charter powers. The fact that charters are never so cancelled by the State shows that this provision is in practice a dead letter. The State control over corporate activity, through the laws governing charters, is therefore very slight in extent and unsatisfactory in operation. The only real regulation occurs after the company has been chartered and has begun business. Outside, or as they are called, "foreign" corporations wishing to transact local business within the State may be required to take out a license or permit, and this permit is usually issued by the Secretary of the State upon payment of a fee. The fee is oftentimes so heavy as to become a burden on the company's business. This is discussed in the Chapter on Unconstitutional Taxes.

(b) **Banking and Insurance.**—The most familiar instances of State regulation are seen in the case of financial institutions. These businesses are so interwoven with the warp and woof of our commercial fabric, and their stability is so necessary to the successful maintenance of business credit, that a special public interest in the security and reliability of banking and insurance corporations admittedly exists. The State therefore is obliged to surround enterprises of this character with special safeguards for the protection of the entire community. Each commonwealth appoints a Superintendent or Commissioner of Banking and an Insurance Commissioner, with the necessary corps of deputies, inspectors and examiners. State banks and trust companies are required to make semiannually and in some States quarterly, a detailed report of their financial condition to the Commissioner. The latter if he deems it necessary may also order a special examination of the books and vaults of any institution to ascertain its solvency and should such an examination show the company's entire inability to meet its obligations it is the duty of the Commissioner to take charge of the assets and wind up the affairs of the corporation.

Similar provisions apply to the powers of the Insurance Commissioner.

Insurance regulation by the Commonwealths, while partially successful in preventing the more disastrous effects of fraud and weakly capitalized companies is not entirely satisfactory, since it involves too heavy a burden upon the large concerns doing business in several States. The entire cost of inspection must be paid by the company; each State also may legally insist on inspecting every insurance concern within its borders so that every company may be subjected to an inspection in every State it enters. In many instances the fees are so heavy and the inspections so frequent as to constitute a serious tax on the business. The insurance commissioner of one Western State, during a recent dull Summer season, decided to "inspect" one of the large New York life companies which did business in his State. With his assistants, who included members of his family, he travelled de luxe to the metropolis and for a week spent a couple of hours every morning in the offices of the company. The afternoons and evenings he and his staff devoted to harmless diversion and recreation, seeing the sights. Having vigilantly safeguarded his State's interests, at the expense of the company, he returned home, embodying in his inspection report *copious extracts from the annual report of the company*. There are many New York companies and many watchful insurance commissioners. The corporations on their part are obliged to charge an insurance rate sufficiently high to offset the extra cost of duplicated inspections, so that the insuring public is ultimately obliged to pay for a series of expensive investigations of each company, most of which add nothing to the real security of the insurance business. For these reasons the leading companies favor a national system of regulation. Such a system would undoubtedly have been established long since, were it not for the Supreme Court's ruling in *Paul v. Virginia*, 8 Wallace 168; 1868, that insurance is not commerce and is therefore not subject to the national power. This ruling has been reaffirmed many times, notably in *N. Y. Life v. Deer Lodge County*, 231 U. S. 495; 1913. The State Commissioner or Superintendent of Insurance examines insurance companies, requires the maintenance of the proper reserve, issues and revokes certificates permitting outside companies to transact business within the State, and supervises the winding up of the affairs of insolvent and defunct concerns. In case any insurance company is found to be fraudulent, or illegally organized, or is about to fail, the Superintendent suspends its officers from control and takes entire charge of its affairs until the court appoints a receiver. The regulation of insurance has gone still further in Wisconsin and some other States where the laws provide that the contract conditions must be clearly expressed in the policy; there must be publicity of accounts; reasonable precautions must be taken to minimize litigation, and in order to reduce the cost

of insurance to the policy holder, the proportion of the premium which can be collected for "expenses" is limited, and the amount expended is limited to the amount so collected. Companies must not pay exorbitant commissions to agents for getting new business and take the amounts necessary to do so from old as well as new policy holders. One clause of the Act, which has caused two companies to withdraw from the State, provides that a company which professes to allow its policy holders to participate in the profits of the business, must file a statement showing what share of the total profits does so reach the policy holders. These requirements have greatly lessened the cost of life insurance in Wisconsin, and in order to lower the price further, the State has provided for the maintenance of a "Life Fund" for insurance purposes. Policies of from \$500 to \$3,000 are to be written by the State itself. The wisdom of this latter plan may well be doubted, as the very essence of insurance is that it should rest upon the broadest possible basis, and any attempt to limit its application to the people of a single State, or to administer it within a single State only, would seem to be a denial of the basic principle on which life insurance is built. It is also the testimony of competent observers that a very small proportion of the people insure themselves unless persistently solicited to do so. If the State cuts down on this expense and abolishes the whole system of professional solicitors, it must mean the very great reduction in number of those who insure, which involves a serious disadvantage to the community. The usual type of banking inspection is illustrated by New York, in which State a Superintendent of Banks, appointed by the Governor, directs the supervision of State banks and trust companies. Examinations are made at least once yearly and oftener when he deems it necessary; if a serious impairment of capital occurs in any bank he may require it to be made up. Safe deposit, building and loan associations and investment companies are also inspected and periodical reports required by law. When a bank becomes insolvent the Commissioner takes over its assets and distributes them, winding up its affairs in the interest of the depositors and other creditors and if necessary calling upon the stockholders for the additional funds which may be required.

**The Kansas Blue Sky Law.**—The protection of the investor is now coming into the foreground. In 1909 an investigation by the Kansas Bank Commissioner, Hon. J. M. Dolley, indicated that Kansas investors had lost from four to six million dollars annually in worthless stocks and bonds, which had been promoted largely by outsiders. From this study of the question he proposed that the State should devise some means of prevention or inspection which would protect its people from the grosser forms of imposition. It was not his thought that every Kansas investor should be safeguarded against all possible loss in speculation, but rather that it should be rendered difficult, if not impossible, for the promoter of

worthless securities to perpetrate what was in substance if not in form, a fraud upon the investing public. The Commissioner calculated that the loss from this source was greater than from the failure of banks. He reasoned that banks throughout the world are government-supervised with the greatest care, and that no objection to this principle has been raised for decades. He asked pertinently why one branch of the investment business should be scrupulously controlled, while men in another branch are allowed to offer stocks which have no basis except the blue sky above and the paper on which they are printed. He estimated that fully 99% of all the money placed in mining stocks is a complete loss. At first Mr. Dolley's plan was to establish a bureau of advice for investors in the State, informing them whether or not the concerns in which they were about to purchase stock were clearly fraudulent. This work multiplied so rapidly that the Commissioner prepared a bill which was passed by the State legislature and which requires all individuals, firms or corporations doing business or selling stocks within the State to file a financial statement of the concern with copies of its charter and by-laws and any other pertinent information which the Bank Commissioner may require, and to secure a permit from such Commissioner before selling stocks, bonds or securities within the State. It also authorizes the Commissioner to examine such concerns in the same general manner in which he examines banks, and to issue a permit if upon such examination the enterprise promises returns on the investment, or to refuse such a permit in case it does not. The effect of the law has been to rid the State of stock fakirs and "blue sky merchants." "The law has been so thoroughly advertised in Kansas that when an agent approaches an investor the first thing the investor wants to see is his permit from the banking department."<sup>1</sup>

The Act has aroused much criticism in outside circles, but within the State it has found great favor and its results have been even better than were expected. In the first year and a half of its existence on the statute books, approximately 1,500 companies applied for permission to transact business in the State; over three-quarters of these were fraudulent or improperly managed concerns which could offer no return on the capital invested—they were chiefly mining, gas and oil companies—of the remainder a large proportion were speculative companies of a dangerous character. Upon being investigated, many of them withdrew their applications for permission to enter the State, and less than one hundred of the entire number received the Banking Commissioner's approval. Well satisfied with the effect of the law the legislature has extended it to include companies selling land, and has required such corporations to show the truthfulness of their statements in certain im-

<sup>1</sup> Letter of J. N. Dolley to Clyde L. King, Editor of the *Regulation of Municipal Utilities*, page 260. Published in National Municipal League Series by D. Appleton and Company.

portant points, such as the improvements made upon the land, etc. Other commonwealths having followed the example of Kansas in the work of protecting their investors from the grosser forms of stock swindling, the constitutionality of this form of State regulation is now being tested in the Federal courts.

(c) **Railway Regulation.**—Much of the State's reputation for bungling and harmful interference with business has been earned in the field of railway regulation. As we have seen when considering the Federal control of commerce, the commonwealths have been permitted by Congress and by the Supreme Court to extend their regulations over a wide expanse of national trade which lay within their borders, so long as the question involved was a distinctly local one. They have used this power to the utmost, both wisely and unwisely. Whether animated by the desire to protect their people or in some instances by other motives, they have left almost no point untouched in the whole department of railway transportation. At first this regulation was carried on entirely by the State legislatures themselves which saw in it a valuable opportunity to increase their popularity. In doing so, they provided rules and regulations on every conceivable question and finally fixed even the charges for freight and passenger traffic.<sup>1</sup> After some successful and many disastrous attempts of this kind it became clear that the legislature, even when honestly desirous of establishing only the best and the wisest standards, could not possibly master all the infinite, technical detail of the railway business sufficiently to make practical or wise rules for it. Nobody who examines the State laws of the period which has just closed can believe the State legislature qualified for this important and difficult task. The complete breakdown of legislative control suggested the idea of a small administrative body which would avoid the temptations to eloquence, oratory and the necessity for making political capital out of a business question. This latter pitfall has been the greatest cause of legislative failure. Anyone who arose upon the stump

<sup>1</sup> The following are examples of many affairs so regulated:

Health quarantines in cases of epidemic.

Prohibition of ordinary wood or coal stoves in railway passenger coaches.

Regulation of bridges,—now reserved by Congress.

Requiring the stopping of a certain number of trains daily at places of a certain size.

Keeping city ticket offices and depots open certain hours during each day for the convenience of the public.

Forbidding the transport of certain dangerous articles such as explosives, without a license.

Regulating the speed of trains in cities and towns.

Prescribing color tests for the eyesight of engine drivers, etc.

To these the Supreme Court added in the *Minnesota Rate Cases* in 1913, the power to regulate freight rates on shipments entirely within a State, even though by so doing the rates on national traffic passing through, are changed, unless the national commission has regulated the subject. There are countless other matters of railway law which the States have been permitted to control until such time as the national authorities act.



and suggested that the rights of the railway be reduced or its duties increased or its charges and rates diminished, acquired instantly a political following which the opposing party could only combat by making still higher and more urgent demands. Undoubtedly the railways had done their part to bring about this popular hostility. In the past their promoters and some of their directors and managing officials had violated every known rule of common honesty towards the public and the stockholders, and had then abandoned the properties to the vengeance of the public. Many of the construction company heads, promoters, financial agents and railway wreckers have been among the first and loudest to declaim against any "government interference with legitimate business interests,"—a fact which has greatly beclouded and retarded the proper settlement of the whole problem and has not softened public opinion towards the companies.<sup>1</sup> But whatever the position of the railways has been the people have nothing to gain from persecution and it was this belief in the wisdom of making a fresh start with fairness to both sides in the future, which finally led to the adoption of the commission plan.

**Railway Commissions.**—The Western States, where the farmers had found the railway rate problem of special importance in shipping their grain, were the first to adopt the commission plan. The body usually consists of from three to seven members, appointed for a long term by the Governor, and assisted by a small force of inspectors, accountants and clerks. It is modelled on the interstate commerce commission, both as to form and general authority. The commission is usually given power: (a) to regulate rates,—by fixing the maximum figure, by determining what shall be a reasonable charge, and by suppressing discrimination as between the large and the small shippers; (b) to control the service,—by requiring greater frequency of trains, better connections with junction points, and

<sup>1</sup> At a time when the companies were making every effort to secure from the Federal commission the much needed increase of 5% in their freight rates which was recently granted and the press was full of demands for the encouragement of honest and legitimate railway management by granting the increase, the public was suddenly astounded by schemes of financial juggling which have not been equalled since the age of Jay Gould and the Erie. One large eastern road had started out to establish an air-tight monopoly of transportation in New England by buying up all competitive shipping and trolley lines. In the process immense sums were paid for properties of little value, for the good-will of persons who had "influence" and in profits to helpful "syndicates"; and one sum of \$30,000,000 of the stockholders' money had vanished into thin air and could not be traced. Another line, in the West, had sold a large issue of bonds to investors both here and abroad. Almost immediately it defaulted on its interest payment and it was discovered that several of the directors had built a side line and sold it to their own company at a colossal profit,—a price far beyond its value—hence the default. These and similar escapades are the real causes of popular distrust of railway management, in which the good have suffered with the evil. See testimony of Ex-President C. S. Mellen in the interstate commerce commission investigation of the New Haven Company and the evidence in the receivership proceedings of the St. Louis and San Francisco Railway, 1914.

more regard to the convenience of the shippers and the travelling public; special emphasis is also laid upon safety of rolling stock and roadbed; (c) to supervise railway accounts,—by requiring reports and uniform accounting methods; (d) to control the capitalization of the railways,—by granting or disapproving increases in capital or permission to construct new lines, and by valuation of the properties, for purposes of rate control; some of the commissions have worked out an excellent system of valuation and this is now being accomplished for the whole country by the national commission.

Much good has been done by these bodies. They have won out in the most difficult task of establishing greater fairness of treatment among shippers, they have reduced many inequalities in the transport rates of different districts in the State and have greatly improved the convenience and other conditions of the service. But railway regulation by its very nature cannot be carried on by two conflicting authorities and in spite of the efforts of legislatures and courts, the State laws have slowly but surely encroached upon those national railway matters which ought either to be left free from interference or subjected only to the national control. The States conflict also with each other, their regulations are diverse and even based on different principles. A line running through two States is subject to three regulations, each made by a separate, independent authority. Such diversity cannot but injure the carriers and hold back their proper development by many years, while depriving the people of their benefits. This is especially true of the *charges* for transportation. The commissions have at times worked serious injury by lowering rates below the margin of profit. Whatever may have been the sins of the carriers in the past, their present managements cannot justly be held responsible nor can the present stockholders be fairly deprived of a return on their investments. Even where the State commission does not desire to inflict such an injury, it is often incapable of establishing an official system of rates without seriously changing the whole conditions of interstate business. The entire problem of railway charges is so inseparably bound up with outside traffic conditions that in most commonwealths it is impossible for a State authority to regulate with fairness to all concerned. Both the making and the regulation of rates are national in their scope. Every year makes it clear that State control of transport *rates* must go and its place be taken by national regulation. In all other respects the State commissions have proven so far superior to the legislatures as a means of regulation that the Commission plan now seems a permanent feature of State government.

**National Control of State Rates.**—The decision in the Shreveport case,<sup>1</sup> holding that State rules, fixing railway rates within a commonwealth, are subject to revision by the national commission

<sup>1</sup> *Houston, East and West Texas Railway Co. v. U. S.*, 233 U. S. 342, 1914.

when they affect interstate traffic, points to the ultimate control of most local rates by the interstate commission. Since this body is already overburdened by its present duties, an increase in its activities would require some change in organization. The most feasible solution of the problem seems to be to add a series of Federal district commissions, perhaps six in number, each with the present powers of the national commission in its district, and with a right of appeal by either party from their rulings to the central body. These six districts might correspond in the main to the six groups of railways which have grown up in the country, with their distinctive conditions of traffic, that is, the Southern, which is East of the Mississippi and South of the Potomac; the Trunk Line which is North of the Potomac and East of the Mississippi; the Mississippi Valley, including the district between the Missouri and the Mississippi; the Western, covering all the district beyond the Missouri; the South Western, including the lines South West of St. Louis; and finally the New England section. The district commission in each of these territories would speedily familiarize itself with the peculiar traffic and business conditions of its zone and would dispatch its work much more quickly than is now possible. It would also take over all rate and service regulations even of the intrastate lines so far as these affect interstate shipments. The right of review by the central commission at Washington would preserve the uniformity of decisions and principles. Such a plan would offer a quick and uniform settlement of rate problems and would avoid all that expensive, time-consuming and destructive conflict and diversity of regulation that we now have.

**Public Service Commissions.**—As popular sentiment on this question has developed, other public companies besides the railways have been regulated by the State; the express company, water supply, warehouses, telephone and telegraph, gas and electric lighting and power, street railways, etc., have all been placed under public supervision. To do this work the State has created a "public service commission," which is simply a railway commission entrusted with broader powers to include the other enterprises just named. The purpose of this plan is to divorce all corporate regulation from politics by taking it out of the hands of the legislature and placing it in the control of a small administrative body, copied after the national commerce commission. The decisions of such a body are not based on excited oratory, nor do politics enter into its rulings. Its work is to examine the facts of the case, to hear both sides and render a decision which is just and equitable to both the consumer and the corporation shareholder. Its proceedings are for this reason more like those of a court, but are much more informal and rapid, and are divested of many of the technicalities, delays and expense of court procedure.

The public service commission plan satisfies two important needs—

- a. A suitable protection of the public both as to service and rates;
- b. The safeguarding of the corporation itself from those radical and violent political attacks by the legislature which cripple corporate property.

The general demand for such a system is shown by the creation of these administrative bodies, under different names and with varying powers, in 33 States and the District of Columbia, and the consideration of similar action by the legislatures of the remaining commonwealths.

**The Maryland Commission.**—A simple example of this authority is provided in the Maryland Act which establishes a Commission of three members appointed for six years, one member going out of office every second year. The Commission employs two attorneys as permanent counsel, a secretary and an adequate force of accountants and clerks. Its jurisdiction covers railways, both steam and electric, other common carriers, gas, heat, light and power companies, telegraph and telephone lines and water supply companies. The law forbids Commission members from recommending the appointment of any person for employment by any corporation, or from receiving free passes, reductions in rates or gratuities or gifts of any kind, nor may a corporation offer such gratuity or employment. The records of the Commission are public and open to inspection, but the facts in any case at issue before the Commission may be withheld from publicity by it for ninety days. The Commission has power to subpoena witnesses and pay them for their attendance. In case of refusal to testify, a witness may be prosecuted before the ordinary civil or criminal courts. No witness is excused from giving evidence on the ground that he would incriminate himself, but by such testimony he becomes immune from prosecution,—the corporation does not.

The Commission has power:

To require a safe, adequate and reasonable service.

To require full statements from corporations as to their capital, their franchises, the ownership of their stock, the nature of the service performed, and their compliance with the law and with the orders of the Commission.

To make switch and side-track connections on railways where these are required by business conditions.

To require common carriers to file and print their rates.

The Commission may also fix rates either on complaint or on its own motion. It may allow a carrier to charge more for a short haul than for a long haul over the same line. It may require a uniform system of accounts. Its approval is necessary for the construction of new railway properties and for the issue of stocks and bonds by any public service corporation. It may also value or appraise the property of such corporations in order to form a just basis for their rates, to prevent them from being unduly deprived of their earning power. In case of complaint to the Commission about

any rate or any question of public service furnished by a corporation under its control, the Commission holds a hearing at which both sides are invited to appear. It then issues an order deciding the case, from which an appeal may be taken within sixty days to the courts.

The great variety of matters both large and small which come before the Commission and the close relation which these have to the comfort, convenience and financial prosperity of all kinds of business interests within the State, are well shown by the following examples of complaints that have recently come before the Maryland Commission and have been quickly and satisfactorily settled by it.

Complaint by fruit shippers that two connecting railways failed to give sufficient service and rates for shipment of fruit. Satisfactory rates established two days later.

Complaint against express company for failure to make delivery at residence of a consignee.

Against street car company when conductors refuse to honor transfer.

Petition for establishment of a passenger station in a rural district.

Complaint against the dangerous condition of the roadbed of a street railway causing unnecessary noise and vibrations.

Permit to sell securities,—“The said electric company is hereby authorized to issue and sell at not less than 95 per cent in cash its promissory note or notes running for three years with semiannual interest at the rate of 5 per cent per annum to the amount of \$75,000.00 and to secure the same by the pledge of \$222,000.00 of its first mortgage 5 per cent bonds, which are to be included in the bonds deposited by the said consolidated company with the Continental Trust Company under the collateral trust agreement.”

**The Wisconsin Commission.**—The Railway Act of 1905 in Wisconsin was amended in 1911 to include all public service companies; it provides for a Commission with extensive powers. Any shipper or consumer may bring his complaint before this body, the burden of proof being upon him to show the need for a change either in service or rates. If the Commission finds a rate unreasonable it issues a rule which can be changed only by the Commission itself or by appeal to a court. In case of appeal, the burden of proof is then upon the person who appeals, to show the unreasonableness or illegality of the Commission's ruling. Full publicity of accounts of public service corporations is required. The appropriation for the Commission is made permanent and continuing, and remains in force until changed by law. The Act of 1907 provides for the valuation of public service properties when necessary in connection with the fixing of reasonable rates. Under the State and Federal Constitutions no person or company can be deprived of its property by

the State without due process of law,<sup>1</sup> and, since every company is entitled to charge rates that will enable it to make a fair return on its property, it is essential for the Commission to know what is the value of that property. All of the newer State laws authorize the valuation of public service companies for this purpose of rate making. The law also provides that franchises of public service companies which have been granted for fixed terms shall be changed to permits for an indefinite term. The advantage of this plan is clear when we remember that capital invested in public service utilities, such as street railways, telephone, lighting plants, etc., requires some assurance of permanence in return for satisfactory service and rates. If the franchise is for a fixed term of years a great uncertainty as to the corporation's control of the property arises towards the close of the term, or a temptation to use questionable means to secure a renewal of the franchise when it expires. If the franchise cannot be renewed, the company allows its property and service to run down. There is no reason why the State should allow such a condition to exist. The indefinite term of the franchise or permit does away with this difficulty and enables the public service company to continue its arrangements with a much more stable and secure tenure, while at the same time it safeguards the interests of the consumer and secures fair treatment. In order to avoid useless competition the Act of 1907 forbids a street or steam railway company to construct any new lines until it has received from the Commission, a certificate of public convenience and necessity. The common use of poles, conduits, etc., is provided, where this is feasible. The Commission also has the power to approve or disapprove the issue of stocks and bonds of public utility companies. There is no reason why \$200,000 of capital should be invested in rival, competing public service companies if \$100,000 will do the same work satisfactorily to the public. The result to the investors must be more favorable if useless competition is avoided. The older theory was that satisfactory public service could only be rendered by a company if it were constantly under the fear of successful competition from another concern. Regulation by a utilities commission, as we have just seen, avoids this danger while still assuring favorable conditions for the consumer.

**Appeals to the Courts.**—In order to prevent undue delay by appeals to the courts from decisions of the State commissions, the laws provide that such appeals must be taken within a certain time, and, in some States, they go directly to the Supreme Court of the commonwealth; in others they are all concentrated in the court of the county or district in which the State commission has its seat. The newer laws provide also that the decisions of the commission are *prima facie* reasonable; that is, that the burden of proof is on the person who appeals from the ruling, to show that the decision

<sup>1</sup> For a full exposition of these provisions of the State and National Constitutions see the Chapter on Constitutional Protection of Business.

is unreasonable or illegal. The best solution of this important question has been reached by those States which declare that the findings of the commission in matters of facts are final and that appeals may be taken only on matters of law. The Pennsylvania Act and those of some other States provide that if new evidence is disclosed during the court hearing, the suit is suspended and the evidence submitted to the commission for its ruling, before an appeal can proceed. Injunctions to suspend the decisions of a commission may only be taken upon the filing of a bond which guarantees payment of costs and losses to the other party in case the injunction is later dissolved. The purpose of all these provisions is to give the commission's rulings a greater permanence and freedom from unnecessary interference by litigation. It was formerly the custom for companies against which complaint had been made to delay a final decision of the case until the shipper was so discouraged that he dropped the complaint. The Wisconsin Act accordingly provides that no appeal to a court shall suspend a ruling of the commission, until a judicial decision has been made. This makes it to the interest of both railway and shipper to expedite the case as rapidly as possible, both in the commission and in the court proceedings. In order to prevent surprises, or the withholding of evidence until the case finally goes to a court, the law now requires the evidence which is to be offered, to be presented to the commission first. This prevents the concealment of evidence with a view to delay.

**The Pennsylvania Act.**—Pennsylvania was among the last of the large commonwealths to establish a Utilities Commission. By the law of 1913 such a body was created with jurisdiction over 27 classes of corporations, including railways, canals, expresses, pipe lines, ferries, tunnels, bridges, wharves, grain elevators, telegraph and telephone, gas, water, heat, refrigeration, and sewerage. The usual regulative powers have been entrusted to the Commission; the Act also contains some features not usually found in other States. The Carmack Amendment is copied from the Interstate Commerce Act by which the initial carrier<sup>1</sup> is made liable for losses occurring on a connecting line, in cases of through shipment. The railways can then adjust the loss between themselves. The long and short haul clause is also included in the Act and the Commission can require uniform reports, uniform accounts, and a standard gauge. The importance of the standard gauge was emphasized recently in a report made by Clyde L. King, in 1913, in the City of Philadelphia on the trolley freight situation. He showed that a difference in the gauge of the trolley tracks on some of the suburban lines made it necessary to transfer freight coming to Philadelphia from one car to another, increasing of course the freight charges and adding to the ultimate price to the consumer. Telegraph and telephone com-

<sup>1</sup> By initial carrier is meant the company which receives the goods for shipment. A shipper whose freight is lost or damaged on a distant connecting line will not have to sue the connecting company in a court remote from his home.

panies are obliged to allow their lines to be connected for through messages where they cannot furnish such through service over their own wires. There was some controversy as to the provision dealing with new issues of stock and bonds. It was felt by some that if the Commission were required to pass upon all issues of stocks and bonds there would be some danger that the Commission would feel compelled to keep rates and charges up to a point which would produce dividends on the securities so approved. On the other hand, some supervision over the issue of securities was regarded as necessary. These two ideas were compromised by adopting the suggestion contained in the report of the Federal Commission on railway securities which had been appointed by President Taft to consider the same question. The State Commission does not authorize the issuance of any securities. It is necessary, however, for the issuing corporation to file with the Commission a certificate of notification, containing all the facts with respect to the issue, and these facts thereby become public property with all the advantages which accrue from publicity. Penalties are provided for false statements and for failure to use the moneys so raised in accordance with the certificate of notification.

**Limiting Competition.**—One feature of the new plan which has begun to attract attention is its influence in preventing the formation of useless new companies in a field which is already well served by existing concerns. The unlimited right to organize a public utility company in all of our States, has led to the promotion of new enterprises regardless of whether there is a demand for them or not. This is often animated by the hope that the new franchise and charter will be bought up by the existing concerns through fear of serious competition. Public service utilities by their very nature are not competitive. We could not have several competing gas, telephone or telegraph lines in the same city, nor can we have rival street railways, nor competitive harbor facilities, and our experience in the steam railway world has shown that competition does not long exist in that field. The public has nothing to gain by the promotion of a new company which appears to be a rival, about to start competition, but which is in reality nothing more than an attempt to force the owners of existing companies to buy the new one. If the attempt is successful and the combination of the old and new companies is formed, the public must pay by increased charges, or by poorer service, for the returns on the new stock issue. After many years of experience of this kind, the public has grown distrustful of proposed competitive enterprises. The State commissions are now usually authorized to approve or reject the granting of franchises for such new companies, and their action is based on the needs of the locality. In using this power they have frankly rejected the competitive theory of public utilities and have established the principle that public regulation, rather than the loose competition of duplicate concerns is the solution of this question. An example is seen



in the recent decision of the new Pennsylvania Commission in the Ashland Case. The town of Ashland was supplied by an electric company which was itself the fruit of a consolidation of two previously competing concerns. In 1913 the Schuylkill Company presented a petition with the approval of the borough authorities, asking that it be allowed to establish competitive facilities for light, heat and power. This would have inevitably produced either a duplicate set of poles, wires, conduits and power plants or the immediate purchase of one company by its competitor. In denying the application of the new Schuylkill Company the State Commission said: "The passage of the Act of July 26th, 1913, and of similar Acts in nearly all of the other States indicates a general judgment that a reliance upon competition between public service companies for securing adequate service and proper rates has not been successful and that hereafter supervision by properly constituted authorities is to be substituted. Long experience has shown that while the temporary effect of competition between public utilities occupying the same territory is to lower rates, the final result is likely to be the absorption of one by the other and then an increase of rates to pay the expense of the warfare. The experience of Ashland which once had two or three competitive companies all of them absorbed by the strongest is an illustration. The municipality in the case of companies furnishing light is burdened with the inconveniences and difficulties which arise from the presence of duplicated poles and wires and finally has to pay at least a reasonable return upon the increased capital required by such duplication. The question always is by what means can the public convenience be best served. It may well be that occasions will arise when because of some fundamental defect in the service by the company in the occupancy of the territory, due to inadequacy of plant, want of financial strength, or some other reason, the public would be benefited by the introduction of a competing company. Such cases can be determined upon their own merits as they arise. No such difficulties are met with in the present case. The Eastern Pennsylvania Light, Heat & Power Company has occupied the territory for twenty-nine years. Its plant is adequate. It has supplied the municipality and the people during the entire period with comparatively little complaint. Should its rates be unreasonable, discriminatory or unduly burdensome, it is always within the power of the commission upon proper complaint to control them and afford relief. The commission is of the opinion that the introduction into the municipality of the poles and wires of a second company organized for purposes of competition would be at least of doubtful utility. The approval of the ordinance is therefore withheld and the application for its approval is dismissed."<sup>1</sup> Most of the commissions have used this power freely and have excluded so many new corporations from the field that the whole commission

<sup>1</sup> In re Petition of Schuylkill Light, Heat and Power Co.; Pa. Pub. Serv. Commission, Municipal Docket 1; 1914.

plan has become a strong protection to the stockholders of existing companies, and has safeguarded them from serious abuses which formerly affected not only the investor but also the rate-paying public.

**Conservatism of State Commissions.**—The conservatism of the commissions is especially noticeable in the important matter of valuation of company properties.<sup>1</sup> Liberal additions and allowances are made for what are known as overhead costs; such as legal expenses, cost of superintendence, interest on capital during construction period, engineering costs and other contingencies. Conservative estimates of depreciation in the value of plants are made but the Commissions also allow for appreciation in value where such has taken place. Where a public service company has undertaken costly improvements such as repaving over its mains, etc., this cost has also been counted in the value of its property. The commissions have also included what is called the "going concern value" which is an allowance made for the expenses of starting the company and getting it into working order. All young companies have unusual expenses of this kind which mount up very heavily before the concern becomes a dividend payer. They include such items as the organization of an office staff, the sale of stock by promoters, the employment of solicitors to secure subscribers for the use of the telephone, gas, water supply or other facilities which the company furnishes. There is also necessarily some expense in experimenting and developing a business policy, all or the greater part of which must necessarily be included in the valuation of the company as a going concern.

The Federal Supreme Court has recently added to the allowances to be made in this connection by declaring that the valuation of a public service company for the purpose of regulating its rates must even include the value of the right of an irrigation company to withdraw from a river the water which it distributes through its canal! In *San Joaquin Canal and Irrigation Co. v. Stanislaus County, Cal.*, 233 U. S. 454; 1914, the company had been denied its right to include this valuation in its appraisal for rate-making purposes. The California Constitution contained a clause that water which was appropriated for sale was appropriated for a public use and it was claimed by the authorities of Stanislaus County that the company having so taken the water had no private right in the withdrawal of water and that this was further shown by the fact that anyone in the district was entitled to claim irrigation connections upon the payment of the required fee. The Court ruled, however, that even though the water was appropriated to a public use the company nevertheless had a monopoly of the right to water supply and that its

<sup>1</sup> See *Recent Tendencies in Valuation for Rate-making Purposes*, Edwin Gruhl, *Annals of the American Academy*, May, 1914. Valuations are necessary when a city desires to buy a gas or light plant for city ownership or when charges and rates are lowered by a commission and the corporation objects on the ground that it is being deprived of a fair return on the value of the property. The question then is—what is the exact value of the property. It is the duty of the commission to calculate this value.

privilege of withdrawing water from the river for this purpose had a real money value just as the roadbed of a railway, though devoted to a public use, yet belonged to the railway company and must be valued in appraising the company's property. The value of water withdrawal must therefore be included among the other rights and properties of the company in calculating the total capital upon which a legal return could be claimed by the company in making its rates.

**Results of the Commission Plan.**—The practical working of the State commissions has been partly successful and partly unsatisfactory. Its great success has been the fair-minded solution which, on the whole, it has given to some of the most pressing, urgent disputes between utility corporations and the public. It has removed most of these from the sphere of partisan politics and has introduced a stronger tendency to co-operation and mutual good will. The commissions have not shown the expected desire to lower rates, except on the railways, but have rather tended to improve service. Most of them are still new and are trying to develop systems of accounting, are making studies of new classes of public utilities, examining service conditions and clearing up the large docket of complaints and grievances which had accumulated under the old system. The unsatisfactory sides of commission regulation have been the delay in securing a final settlement of disputed cases; the ultra-conservatism of some of the commissions; their interference with public ownership of utilities by the cities; and to some limited extent, partisan politics in the appointment of commission members, notably in New York City.

**Criticisms of State Commissions.**—The most serious objection urged against the new plan has been the delay caused by dilatory appeals to the courts. Undoubtedly this is an important defect which requires correction. Some of the States provide that appeals from the commission on any subject shall be concentrated in one court, choosing for this purpose the county court in which the State capitol is located. Such appeals take precedence over all other business except election cases and suits for damages. This has been adopted in the Pennsylvania Act of 1913. From this court an appeal may be made to the State Supreme Court. Clearly this is unsatisfactory because it permits two judicial proceedings after the order of the commission has been handed down. Some States provide for a direct appeal from the commission to the supreme court. This is the proper solution but in most of the commonwealths it is impossible because the original jurisdiction of the Supreme Court is limited by the State constitution. In New York the first commission, having charge of the New York City district, has been so overburdened by the mass of matters crowding upon it that its decisions have been delayed by overwork, a fact which has been made much of by critics in other States. This is not an objection to the commission system as a whole but is a proof of the need for an additional district with another commission to take care of the extra business.

Many observers have recently pointed to what they consider an <sup>1</sup> excessive conservatism in the rulings of the State commissions and have condemned the failure to secure lower rates, the unwillingness to force better service conditions and the appraisal at excessive values of public service plants which were about to be purchased by the city governments.

Undoubtedly there is weight in some of these charges. The commissions, as we have seen, have not striven to reduce rates as a general policy but have laid greater emphasis upon improved service. While no comprehensive survey of the rulings of State commissions has been prepared, a partial examination of their decisions clearly shows the general improvement in service rules for the benefit of the consumer. The delay in securing a settlement of important questions is usually not chargeable to the commission but to the companies which make full use of their rights of appeal and delay. This, as we have seen, is not an inherent part of the commission plan but may be improved by constitutional or legislative changes. As to the excessive valuation of public utility plants which are about to be purchased by the cities and the consequent defeat of municipal purchase because of the prohibitive price which results, the commissions have probably given cause for some criticism.<sup>2</sup> They have made many allowances of claims of value by the companies which could probably not be justified in detail nor even itemized by the commissioners themselves. Some members are secretly, if not openly, opposed to municipal ownership and their decisions reflect this hostility.

In California, Colorado and other States each city has local option in the matter of establishing its own municipal commission or in subjecting its public utilities to the State body. The league of Nebraska municipalities, the league of commission-governed cities in Illinois, the voters' league of Minneapolis and the city authorities of Chicago have all made strong efforts to prevent the extension of State authority over the local public service. The principle of municipal home rule has been invoked. Thus far the State commissions have come off victorious but there is a widespread demand for improvement, and a further adjustment allowing for greater local activity seems advisable.

**Lower Rates for Large Industrial Consumers.**—It is also charged by the critics of the State regulative system that State commissions allow lower gas and water rates for large industrial companies than for small consumers. The action of the Wisconsin commission in the Milwaukee gas and water cases and in the Waukesha gas case is especially pointed to as proof of this policy. In all three of these instances the State commission in revising rates, allowed the large

<sup>1</sup> A partial summary of these criticisms is given in an article, "State v. Local Regulation" by S. P. Jones, Secretary, Voters' League, Minneapolis, published in *The Annals*, May, 1914.

<sup>2</sup> The State laws usually provide that in case any city wishes to purchase a public service plant the valuation shall be fixed by the State commission.

continuously as possible. If all the electricity required is called for at night, for example, the result will be that it will be idle most of the time, but if during the daytime consumers can be encouraged to use the current for power, the output of the plant can be very greatly increased without an increase in expense. The same is true of gas, if the entire use of gas is restricted to the nighttime, as in the case with street lighting consumers, then the plant will remain idle 80% of the time. In order to make this idle time productive, it is necessary to offer lower rates to the large factory consumers to induce them to use the product and enable the plant to produce a larger revenue. It is claimed that by keeping the public utility plants busy throughout the day, the load of business is distributed throughout the day, and the charges for small users may be reduced. Both gas and electric current are very costly for ordinary industrial purposes,—the only way for the big plants to use them is to reduce the price. This reduction is not made at the expense of the small consumer. On the contrary, it helps him although he has to pay more than does the manufacturing plant. This is the "step rate" plan, by which three or four grades of rates are charged according to the amount of water or gas used, and while the policy seems at first glance to discriminate against the masses of the people in favor of large corporations, yet it is claimed to be a beneficial one, both in reducing the cost of production and encouraging industry, while at the same time making it possible to give the small consumer a reduction in his charges.

These briefly summarized criticisms show that the exact details of the State commission to the municipal authorities have not yet been worked out satisfactorily. See also the report of the

faction given by the commissions in the assurance of a fair, public and constantly accessible tribunal for the settlement of all disputes between the public service corporation and the consumer. When the changes above suggested have been made, the causes of unnecessary delay in appeals have been removed, the relations between the State commissions and the city governments satisfactorily arranged, a more equitable and scientific method of valuing local utility plants perfected and reasonable opportunities for the cities to acquire their public utilities provided, we shall have reached a solution of the most difficult problem now confronting the State government.

(d). **State Regulation of Trade Conditions and Competition.**—All the States prohibit, either by statute or common law, any combination to restrain trade unreasonably. These prohibitions have lain dormant upon the books until the recent Federal prosecutions under the Sherman law aroused new interest in the subject. It was found that for many decades the courts both in this country and in England had held that since the public were entitled to the benefits of free competition, every competitor must be allowed to sell as low as he pleased. But in fact certain large corporations, using this freedom to undersell their competitors in one section, made up their losses, from higher prices in other districts where there was no competition, and when the competitor in the first section was driven from business, prices were then run up to a higher level than before. The legal principle of free competition was used to destroy competition; an intended protection became an instrument of oppression. Many efforts have been made to remedy this situation, one of the most effective being the South Dakota Act of 1907 which provides that if any person or corporation engaged in the production, manufacture, or distribution of any commodity in general use within the State, knowingly, for the purpose of destroying competition, discriminates between different communities in the State by selling its product at a lower rate in one community than in another (with due allowance for distance from the point of manufacture, freight rates, etc.), such person or corporation shall be guilty of unfair discrimination, and subject to a fine of from \$200 to \$10,000. Any party who is injured by such discrimination may complain to the State Attorney General who shall thereupon investigate, and if necessary prosecute a suit against the person or corporation so accused. And if sufficient evidence is produced in such suit, the court may annul the charter of the company, or if it be a foreign corporation, may revoke its permit to do business within the State. This same principle has been followed in New Jersey. Its constitutionality was attacked but has been upheld by the Federal Supreme Court in 1912.<sup>1</sup>

leading cities formed in November, 1914, the Bureau of Research in Municipal Public Utilities, which enables any city that is a member to obtain public service experts at a reasonable cost and to make use of the experience of other cities.

<sup>1</sup> See *Central Lumber Co. v. So. Dakota*, 226 U. S. 1571, 1912.

conscious, they have explained repeatedly that stop a bad corporation was at its birth, and that the rec by a State, of charters to engage in any and every busine standing temptation to fraud, over-promotion and ger rate irresponsibility. In this orgy of company prom Jersey led the way, and it was appropriate that New Je start the new movement towards a better corporate sy though the means proposed are far from perfect. Governor Wilson in his second annual message to the leg January 14th, 1913, said:—

“The corporation laws of the State notoriously stand alteration. They are manifestly inconsistent with the po Federal Government and with the interests of the people important matter of monopoly, to which the attention of nation is now so earnestly directed. The laws of New they stand, so far from checking monopoly, actually enc They explicitly permit every corporation formed in New ] example, to purchase, hold, assign and dispose of as it p securities of any and all other corporations of this or any o and to exercise at pleasure the full rights of ownership in cluding the right to vote as stockholders. This is nothing an explicit license of holding companies. This is the ver of forming vast combinations and creating monopoly, agai the whole country has set its face; and I am sure, that t of New Jersey do not dissent from the common judgment law must prevent these things and prevent them very effe

“It is our duty and our present opportunity to amend th of the State in this matter not only, but also in such a way vide some responsible official supervision of the what increment

1. The first Act defined trusts to be combinations or agreements to restrict trade or acquire a monopoly, to limit production, to fix or increase prices, or any secret, oral or tacit agreement or understanding to restrain competition either by pooling or withholding from the market, or selling at a fixed price, or in any other manner. A violation of the Act may be punished and this punishment may take the form of revoking the charter of the corporation or fine or imprisonment of the directors, etc.

2. The second copies the South Dakota law of 1907, and makes it unlawful to sell any commodity, product or public service at a lower rate in one section of the State than in another (cost of transportation being considered), in order to destroy competition or restrain trade.

3. It is made a misdemeanor to organize or operate any corporation with the intent to use it directly or indirectly in order to restrain trade, or to acquire a monopoly.

4. The holding company and the excessive issue of stock to pay for new properties are aimed at by the fourth law:

a. A company may purchase the stock of another corporation only when the two are alike in character and the property is to be used by the purchasing company in the direct conduct of its own proper business.

b. When one company in this way buys the stock of another, the purchasing corporation may not issue a greater amount of new stock for the purpose, than the sum which it actually pays for the stock of the other corporation.

c. Whenever stock is issued for property purchased, a majority of the directors must sign and file a statement with the Secretary of State showing what property has been purchased and the amount actually paid therefor. A false statement, if knowingly made, constitutes a misdemeanor.

5. Companies are prohibited from buying, selling, or holding, the securities of other companies except in payment of debt due from such other corporations, or as a temporary investment for surplus earnings; or as in the case above mentioned under the fourth Act, companies already in existence at the time of the passage of the law may continue to hold securities which they have purchased.

6. The permission formerly given by law to companies formed by merger or consolidation to hold and vote the stock of other companies is revoked.

7. Before any merger or consolidation of certain corporations can be made, written approval must be obtained from the Public Utility Commission of the State.

These laws have been too recently passed to demonstrate in practice their success or failure, but they seem to rest on two separate and distinct foundations:

First the desire to prevent certain flagrant gross abuses of corporate power—such as



Fraud and misrepresentation,  
· Stock watering,  
Artificial manipulation of prices to exploit and oppress the public.  
This purpose is especially noticeable in the first Act. In the second place, the laws also attempt to force competition by preventing holding companies and discouraging consolidations.

These two separate objects conflict with each other—one is feasible and the other is not. The first may best be secured by establishing some public authority which will watch over the general schedule of prices, as fixed by agreements; the conditions under which mergers and consolidations are formed, and permit those which are desirable and prevent or correct those which are harmful.

The second purpose is really a means of carrying out the first. It is thought if consolidations can be discouraged and stock-holding by other corporations prevented, that legal combines for the purpose of exploiting the public, fixing prices, and suppressing competition, will be rendered impossible. The strong objection to this second purpose is that it may be very good in one case and hurtful in another. If a consolidation is advantageous to the public, it should be made. If this consolidation can best be made by a holding company, that should be allowed, yet the law visits its penalty on both the good and the bad alike if they resort to the holding company form, or to any one of a number of other practical methods of consolidation. What is needed is not a general sweeping condemnation of all combines, as provided by these Acts, but rather a permissive authority, which will separate the good from the bad by administrative procedure after hearing evidence and making thorough investigations and thereupon decide what shall be permitted and what forbidden. The control of agreements in each State by a regulative public authority, is the practical way out of the difficulty, just as the National Government should control agreements in national commerce. A review of State experience in corporation control shows that the next steps should be (a) the establishment of some such permissive board or commission which would sanction or disapprove important corporate Acts of those companies which are not already under the control of the public service authorities or the banking and insurance commissioners,—that is, the ordinary manufacturing and commercial corporations; and (b) a relentless, insistent extension of the publicity principle. The first would prevent the grosser forms of extortion, business piracy and assassination, without in anyway preserving the inefficient or wasteful producers. The second would protect the investor on a side in which such protection is much needed, for outside of farming and real estate the funds of the community must be invested in corporation shares. It is no longer possible to tolerate concealment and irregularity in corporate affairs, under the pretext of encouraging freedom of enterprise; for with every new stage of growth in manufacturing and trading, the interdependence of all interests upon each other increases and becomes

more apparent, so that some State-assured minimum of safety from corporate dishonesty is as essential as a State protection against the other forms of burglary. In our regulations of business we have given too little attention to the small investor, the man or woman whose savings are often placed on the advice of some alluring advertisement or attractive circular which later turns out to be misleading. Or if the savings are well invested they may be "shaken down" in the ordinary processes of manipulation and reorganization. We may never hope to protect the fool from his folly nor the inveterate gambler from his vice, but we must offer some degree of safety to those who, having earned and saved, wish to take part in the general prosperity by placing their share in the general capital.

There is probably no stronger influence towards genuine conservatism in America to-day than the profitable and well-protected investment of small funds. It behooves the State in a special sense to care for the safe-guarding of these and to encourage their growth. The administrative obstacles to publicity are serious but not insurmountable; it is even now difficult and at times impossible for the State officials to secure proper, accurate statements on financial matters from the companies which are already subject to control, and it might be still more so from other corporations; there are also such differences between the rules of different Commonwealths and in their comparative efficiency that no general solution of the problem could be worked out by the States. If as seems probable it shall become clear that the States are unequal to the task, then the jurisdiction of the National Government might well be extended to obtain the desired result, by some such device as that suggested at the close of Chapter VIII.

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## QUESTIONS

1. Why should a State government regulate business conditions?
2. Explain the general lines along which regulation has run.
3. A manufacturing and trading company wishes to secure a charter of incorporation—explain the general procedure which it follows in most of the States.
4. Can a corporation transact business not mentioned in its charter? Reasons.
5. Why do so many business concerns incorporate in Delaware and West Virginia?
6. May a State government cancel a charter which has been violated by a company? Does it?
7. Your company has a Delaware charter and wishes to open an office in Chicago—does its charter entitle it to do so without further formality? Reasons.
8. You are discussing the necessity of State regulation of banking, and insurance contrasted with State regulation of the farming business. What would be your view and why?
9. How are insurance companies inspected by the State?
10. Explain fully the defects of this system. Example.
11. Would you favor or oppose national regulation of insurance companies? Why?
12. Explain fully, with constitutional reasons, why the National Government does not regulate insurance, and cite authorities on this point.
13. How can the States lessen the cost of life insurance in private companies?
14. Resolved that the State should not sell life insurance. Defend either side.
15. Is it advisable for the State to attempt to protect the investor from fraud? Reasons.
16. Explain fully the causes of the passage of the Kansas Blue Sky law.
17. Outline the Act.
18. What have been its practical results?
19. Prepare a brief essay on the advantages and disadvantages of a Blue Sky law in your State.
20. Give briefly the origin of the State prohibition of restraints on trade. How has the legal principle of free competition been used to destroy competition?
21. Explain the connection between this change and the South Dakota law of 1907, forbidding improper competition. Outline the Act.
22. The Doe Manufacturing Company sells its product in Trenton and Camden, New Jersey. The legislature forbids companies selling in more than one place within the State to lower prices in one place with the intention of destroying competition there. The Doe Company claims that the law deprives it of the equal protection of the law and is discriminatory, applying only to companies selling in more than one place, and thereby violates the 14th Amendment. What would the court decide and why? Cite an authority.
23. Explain the general purposes of the Seven Sister laws in New Jersey, giving the chief reasons for their passage.
24. Outline the Acts briefly.
25. Resolved that the Seven Sister Acts are partly correct and partly incorrect in principle. Defend either side.
26. Why have corporations received special attention from the regulating power of the State and why are they of special importance to the small investor?
27. Give your impressions of the value of a State trade commission.
28. Explain what authority the States have over interstate railways.
29. Give some examples of laws passed for this purpose.
30. What is the disadvantage of regulation by State legislatures in this field?
31. Explain some of the more important causes of popular hostility to the railway companies.
32. How does this affect a solution of the regulative question to-day?

33. Why was the railway commission plan adopted and what is the difference between it and legislative regulation?

34. What are the powers of the railway commissions?

35. What practical benefits have they secured for the public?

36. Where have they failed and why?

37. A State lowers the local freight rates on shipments within its borders. The railways protest claiming that this affects freight rates on shipments passing through from other States in national trade, and that the change can therefore only be made by the interstate commerce commission or by Congress. If it proves true that national freight rates are affected, is the State act illegal? Reasons. Cite an authority.

38. If in such a case as the above, the national commission attempts to change interstate rates in such a way as to affect rates within the State, is its action legal? Reasons. Cite an authority.

39. It is claimed that the National Government should control all local freight rates which directly or indirectly affect interstate trade. What is your impression of this claim?

40. It is argued against this claim that the commission is already overburdened. Explain and discuss any practical proposal for relief.

41. What is a public service commission and why is it so called? What is the difference between a public service and a railway commission?

42. What are its advantages over legislative regulations?

43. How would you show that the commission plan met present needs?

44. Outline the organization of the Maryland commission?

45. Explain the powers of the commission and give some examples showing the nature of its work and decisions.

46. Explain the chief features of the Wisconsin commission and its powers.

47. Outline the distinctive features of the Pennsylvania law.

48. Explain how appeals from the decisions of a commission are usually regulated by the State laws.

49. How is excessive delay in appeals avoided?

50. Summarize the principal methods of regulating security issues with the advantages of each.

51. An electric light company has been established in a small city. There are occasional complaints as to rates and service. Some of the citizens talk of the need of competition. What would be your attitude and why?

52. Taking advantage of some discontent with the existing company a new company is formed and secures the consent of the State authorities to erect poles and wires and offer light at a lower charge, but the law requires the approval of the State public service commission before the new company can operate. What would the commission probably decide and why? Cite a precedent.

53. Do the commissions as a rule favor reduction of charges or improved service and why?

54. John Doe owns some stock in a water supply company. It is proposed to establish a State public utilities commission. Would Doe's financial interest be helped or injured by the establishment of such a body? Reasons.

55. Why do the State commissions appraise or value the property of public service companies?

56. Cite the clauses in the State and National Constitutions which affect this problem.

57. In valuing a plant will a public service commission include the cost of incorporating the company? Why?

58. What is meant by going concern value? Is it included?

59. A company has a monopoly of the slaughtering business in a small city, it has paid nothing for this right or franchise which, nevertheless, is highly valuable. Must the value be included, in appraising the total value of the company's property? Reasons. Cite a precedent.

60. Explain your impressions of the most successful aspects of commission regulation.

61. Of the unsatisfactory sides of commission work.
62. What are the causes of delay in carrying out the rulings of the commissions?
63. How do the commissions' powers affect the purchase by cities of their local public service plants?
64. How do the commissions generally affect the rights of the cities to settle their own public utility problems as they please?
65. The State commission allows the gas company in Bytown Center to furnish gas to large consumers at 70c, to small consumers at 85c. At the end of a year it lowers the small consumer's rate to 80c. There is a gathering storm of public indignation and demands that the small consumer be given the 70c rate. Explain the arguments on both sides and give your views as to the correct course to pursue, with reasons.
66. Have you a public service commission in your State? If so, what are its powers?
67. Prepare an essay on the advantages and disadvantages of public service regulation by commissions.
68. Write up a summary history of any complaint made to the public service commission in your State and of the action taken upon it.

## CHAPTER XIX

### THE STATE—Continued

#### LABOR

ALTHOUGH "labor questions," as we call them, have existed from prehistoric times, the exact form which they have now taken is new and brings with it a new view of the State's authority and duties. The needs which the State is striving to satisfy are:

1. Increased efficiency of the worker.<sup>1</sup>
2. Factory laws, including also regulation of the hours of labor.
3. Compensation for accidents to workmen.
4. The settlement of disputes between employer and labor.
5. The wage rate.
6. Improvement of the worker's status in legal disputes.

2. **Factory Laws.**—The intervention of the State in factory and workshop has done more than any other government measure, except education, to civilize modern industry. However critically we may regard government interference in other fields, in this department it has undeniably wrought a great improvement. In the smaller workshops and tenement houses there is still need for thorough regulation. During his waking hours the worker's health and safety are determined by the conditions of the factory or workroom; his welfare demands healthful and reasonably comfortable surroundings. If we followed him through a day's labor we should find that he is constantly confronted by a number of dangers to both safety and health, under conditions which he is often unable to avoid, but which may be improved by State action. The prevention of these dangers is a public service which benefits directly one-quarter of our people. It includes the following subjects:

- a. Dangerous machinery;
- b. Ventilation and sanitation;
- c. Decency and morality;
- d. Fire protection;
- e. Hours of labor;
- f. Sweatshops.

Each commonwealth has established a special department of factory inspection with a chief inspector and a force of deputies, each deputy being responsible for the conditions in his district.

<sup>1</sup> This improvement in the worker's effectiveness is second to none in practical importance; the means by which the State can assist are shown under Vocational Education in a subsequent Chapter.

The number of deputy inspectors is entirely inadequate, the largest being 125 in New York.

**a. Dangerous Machinery.**—All machines, elevators, engines, boilers, belting and other dangerous mechanism must be surrounded with proper safeguards to prevent injury to employes and others. This clause has been found difficult to administer because of the slowness to adopt modern safety devices, also because of the unwillingness of the workers to keep the safeguards and appliances in the proper position. The latter obstacle has been particularly noticed in looms and factory machines generally, where any delay in operation is occasioned by the necessity for keeping the appliances properly placed. It is frequently reported that in spite of the positive instructions of superintendents and inspectors alike, the employes have removed safeguards from machinery.<sup>1</sup> The explosion of steam boilers is guarded against by a careful system of boiler inspection and the requirement that regular tests shall be made. These latter are often conducted by the boiler insurance companies.

**b. Ventilation.**—In many textile industries the nature of the fabrics produced and the character of the work to be done require a heated, damp air throughout the entire day, while in others, such as lead and paint mills, the dust and smoke continually arising from the necessary processes of manufacture are highly injurious. In still others the crowding together of large numbers of people in poorly heated rooms, makes ventilation impossible in the winter time, while in summer the conditions are worse. This is not true of the larger and newer establishments, in which high ceilings, abundant light, and modern air-supplies are provided, but in the smaller and older buildings the lack of light and ventilation is common, and necessarily affects the health of the inmates. Most of the States now prescribe a certain number of cubic feet of space, from 250 to 1,000 feet, for each person employed, allowing the deputy inspector to use his judgment in regard to the suitability of the means of changing the air. It is doubtful if this expedient will prove permanently satisfactory, because of the large number of shops and factories situated in old buildings with inadequate systems of ventilation.<sup>2</sup>

**c. Morality.**—The tone of decency, modesty and morality is lowered by any failure to provide reasonable and separate wash-room and toilet facilities for men and women employes. Factory life, at its best, is apt to be clean, wholesome and moral in influence,

<sup>1</sup> A remarkable improvement in the large factories is being wrought by such associations of employers as the National Metal Trades Association; this body sends to its members a full description of the latest ideas and inventions for safety purposes. Undoubtedly a very great proportion of accidents could be prevented by a systematic campaign of education among both workers and employers, both of which classes need much enlightenment on the subject.

<sup>2</sup> See the description of the Ohio, Wisconsin and New York labor departments, below.

but in the large cities where floor space is expensive and unsuitable buildings are utilized, the provisions for personal comfort, cleanliness and decency are often such as cannot be tolerated with safety, and frequent complaints of these conditions are made. All of the States now require separate adequate provision to be made but the laws are usually enforced with laxity.

**d. Fire Protection.**—The maintenance of fire escapes in all factories, mills and tenement houses is compulsory, but practical tests of the capacity of the means of escape are not usually held except on the initiative of the employer. A vast majority of fire escapes are entirely insufficient to accommodate the employes in time of a sudden rush. Fire drills are not, but should be required by law. They are the only means of preventing loss of life in large establishments.

**e. Child Labor.**—The evils of child labor are sought to be ameliorated by prohibiting the employment of persons under a certain minimum age, varying in different States. In Massachusetts, Illinois, New York and Pennsylvania, 14 has been fixed as the age limit. It is also provided that between this age and 16 years, children who are employed in factories must be able to read and write English and to have attended school according to law. No children under 18 are allowed to work more than a certain number of hours per week nor more than a certain time in any one day. This limit also varies somewhat, a common provision being 54 hours per week and ten hours in any one day. A list of the names, ages and residences of all children employed in the factory must be furnished by the employer to the deputy inspector, and posted at the factory. The first two of these provisions, restricting labor under a certain age, are evaded in most of the densely populated manufacturing districts. This is not the fault of the employers but is rather due to the eagerness of parents to secure the small amount of wages which may be earned by the child. In many instances, particularly in New York and Pennsylvania, it has been found that parents are sometimes willing to commit perjury in order that their children should be so employed under the legal age and it is not safe to depend upon parents for active co-operation in the execution of the law. In Massachusetts an effective plan to prevent evasion has been devised which is now adopted in Pennsylvania and other States. This requires that the age certificate shall be issued by the *school authority* of the proper district. The school superintendent on his part refuses to issue the certificate unless the school records show the child to be fourteen or over or unless a properly attested birth-certificate is produced.

The hours of labor for women are usually fixed at the same maximum as those for children. The number of hours is being gradually lowered in many States; it is impossible to fix a reasonable limit for all industries, such limit depending on the nature of the employment. All forms of piece-work in factories are prone to occasion



a nervous strain which is accompanied by serious effects if maintained during a ten-hour day. On the other hand, ten hours in a department store would not involve more than eight hours of work in other lines, except during the period of holiday trade. A careful classification of industries is urgently needed as a basis for the regulation of hours.

The national conference of commissioners on uniform State laws, has provided a model child labor bill to be introduced in the legislatures. The chief provisions of this measure are: the prohibition of all factory labor for children under 14; the fixing of 16 years of age for certain dangerous occupations, especially those connected with dangerous machinery; the requirement of employer's certificates and records of school attendance and of certain minimum educational standards; children under 18 years of age are to be forbidden in certain other more dangerous occupations, and all minors are excluded from employment in connection with saloons or establishments where intoxicating liquors are sold; the eight-hour day is prescribed for boys under 16 and girls under 18; newspapers may not be sold in large cities by boys under 12, nor girls under 16. The advantage of such a uniform measure to all concerned is that it would fall with equal weight upon all manufacturers who are competing in the same field while lack of uniformity is a heavy handicap upon those who are located in the States having the highest standards. Competition in manufacturing should not be based on such a difference in the laxity of the law.

**Hours of Work for Men.**—Next in importance to the working hours of women and children is the limitation of time for men. A noteworthy growth of legislation along this line may be traced. At the outset all restrictions upon the conditions of labor contracts were resisted both by employers and workmen, as involving a State interference with the freedom of contract of the individual and as being therefore unconstitutional. For example, the law requiring the payment of wages to be made at least once in every two weeks was declared unconstitutional in Pennsylvania, as were also the New York, Pennsylvania and California laws providing one day of rest weekly in bakeshop work. While these measures were intended to promote the welfare of the laborer, they were held by the courts to be an unwarrantable interference with his and the employer's right to make a contract, and therefore contrary to the 14th Amendment as a violation of liberty and property. The legislation restricting the work of women and children, however, is based upon the protection of health. It has been sustained on this ground in all the States where a case has arisen, the courts holding that for the necessary protection of health and safety the freedom of contract may be limited without violating the purpose and intent of the Amendment. But the protection of health is a matter which may be extended even to adult men in mines and dangerous industries, and recent decisions have established the point that an eight-hour

law governing miners is constitutional and valid so far as it is based on the protection of health.<sup>1</sup> The same doctrine has been maintained by at least one State court in upholding a limitation of hours of labor in a bakeshop on grounds of health protection. As a rule, however, the working hours of men over 21 years of age may only be regulated in dangerous industries.

f. **Sweatshop Laws.**—Last but by no means least in the list of dangers against which the law has been directed, is the "sweatshop." A manufacturing, repairing or renovating business carried on in a dwelling or tenement is usually called by this name. Clothing manufacture is the chief sweating industry; the materials are taken home, usually from a custom-tailor's establishment, and are finished by all the members of the family and sometimes several other persons from the outside, all working, perhaps, in a single small tenement room. The crowded condition of the workroom, the latter usually being also the living room of the family, makes cleanliness difficult. The garments in course of manufacture are piled promiscuously about the workroom and bedrooms. In case of contagious disease the utmost care is used to prevent discovery, for discovery means a raid by the factory inspector. The completed garments being returned to the tailor, often spread the disease. By carefully tracing the sources of contagion it has been found that a single lot of clothing made by one family has caused over a dozen other cases of smallpox.

While the danger to the public health is the most apparent of all the disadvantages of the sweatshop, it is not the most serious. The gravest evil is wrought upon the workers themselves. The workshop atmosphere has conquered that of the home; poor ventilation, long hours, child labor, overwork and low wages have become the common incidents of the sweatshop. Since the finishing of clothing is all paid by the piece, the earning capacity of the family depends upon the quantity of work turned out, which in turn depends upon the number of members, their speed and the length of the working day. There are no restrictions on work in the home; the whole process resolves itself into a simple test of human endurance, in which every man, woman and child is driven to the utmost by the hope of earning a little more. The head of the family often is tempted to secure more work by under-bidding other families, and the price per piece is lowered, a process that has taken place slowly but steadily in all the large cities in spite of union, strike and consumers' league. By successive stages of competition the home workers have lengthened their hours to an unheard-of extent, increased enormously their output and kept wages at the minimum point of subsistence! The reason for this suicidal policy lies in the extensive immigration of certain races and in the transfer of the industry to the home of the laborer. Any body of men and women working in a factory must necessarily feel that their interests

<sup>1</sup> Holden v. Hardy, 169 U. S. 366; 1898.

are common, so that a lowering of wages or increase in hours is felt and resented by them *as a body*. But when the laborer works at home the question which confronts him is how can *his immediate family* earn more? The answer is natural—by increasing the working hours and by bidding for work. Against this apparent, momentary advantage the union spends its efforts in vain. The situation is rendered more difficult by the ignorance of the workers, most of them being unskilled immigrants.

In attempting to cope with sweatshop conditions the States have done little or nothing to improve the condition of the workers but have insisted only on clean rooms and that only members of the family shall work in the family quarters. All persons who secure work from employers to be done at home in a tenement house must have a permit issued by the factory inspector or the board of health. No work may be given out by the employer unless the permit-card is shown to him. This permit is only granted after an official inspection of the premises to see that they are properly cleaned, that the bedrooms are not used for manufacturing purposes, that the proper amount of cubic space of air per person is allowed, and that no contagious diseases are prevalent. The granting of the permit is made contingent upon the proper compliance with these conditions; the permit may also be revoked at a moment's notice, should the law be violated.

The law applies in most States to the manufacture of clothing, trimmings, tobacco products and to renovating establishments, and in some States also to bakeshops. Much still remains to be done. It will be seen that one of the gravest evils of the sweatshop, namely the excessive exploitation of child labor in the family, has not been prevented. This is a defect in the law itself and in the standards of life of the foreign immigrants. Furthermore, the administrative difficulties of the case are serious. In the first place the number of persons engaged in sweatshop industries is very large. In order to keep strict account of these, the inspector would be obliged to make visits to each establishment at least quarterly during the year, but this is impossible in most cities. In the second place the frequent change of location renders it unusually difficult to trace violators of the law. According to the legislation of all the regulating States on this point, a permit is granted separately for each location, but it is impossible to ascertain without an actual visit whether a person presenting a card at a tailor's establishment really lives at the residence named on the card or not, and the tailors certainly cannot be required to make inquiry.

Again the racial, religious and social ties of the persons engaged in sweatshop work tend to promote collusion to evade the law. News of the inspector's arrival in the neighborhood is usually spread with rapidity and cases of contagious disease are secreted, or if this is impossible, the work itself is hidden by the neighbors. It is the experience of deputy inspectors that the more ignorant classes are

prone to evade the law whenever possible. Finally, it is a common practice to borrow and lend permits when applying to tailors for work. Under ordinary circumstances the clothing firms giving out work cannot detect the falsehood, while the deputy inspector may not discover the absence of a proper card for six months or more.

Nearly all these administrative obstacles might be remedied by an increase of the personnel in the factory inspection department. That the State will in course of time be obliged to go even further to insure reasonable healthful and comfortable conditions of home labor, can hardly be doubted.

The future development of factory and shop inspection must consist less in additional law making than in securing a reasonable execution of existing laws. There is no State in which a proper standard of administration has yet been reached. Individual employers of the better class frequently improve conditions on their own initiative, and would probably do so without a compulsory law, but those who conform to a lower standard require supervision and compulsion by some public authority. The need of a strong and enlightened public opinion is as great in this field as in any other department of administration. The formation and guidance of this public sentiment must depend primarily upon the employers' association and the labor union. While the unions have already done much in this direction, a systematic and methodical plan of aiding the factory inspectors in the execution of the law is needed. For the protection of employers much greater care should also be exercised by the Governor in selecting inspectors; a position such as this, on which the safety and even the lives of the workers depend and which so closely touches the employer's interests, should not be made the plaything of partisan politics.

In Wisconsin a new type of factory act has been tried with success; this requires that shops, factories, etc., shall be kept "safe" for both employes and frequenters, but it leaves the exact interpretation of "safe" to an industrial commission which regulates details and administers the law. The deputy inspectors are instructed by this commission how to enforce the law and a series of administrative regulations are drawn up and published by the commission. Employers and others may appeal, from the acts of any deputy, to the commission and from its decision to the courts. The advantages of this plan are greater reasonableness and elasticity of the rules governing safety. Other States are following the Wisconsin precedent. The New York law of 1913 establishes an "industrial board" consisting of the State commissioner of labor and four other members, which makes investigations of all matters affecting the enforcement of the State labor law and issues rules and regulations to execute the law. That is, the New York Act applies the excellent Wisconsin principle not only to safety, but to all important questions affecting the labor law and enables the industrial board by its

regulations to keep that law thoroughly up to date and fit it to the special needs of each industry. The various rules issued by the board must be immediately published and distributed, in a "labor bulletin"; they form "the industrial code" and have the binding force of law. The practical benefit of this administrative type of regulation, as compared with regulation by the legislature, is clear the moment that we glance at the work of the board in such a subject as ventilation. This is one of the serious difficulties of factory regulation, especially in the older and smaller buildings; in some industries it causes grave and even fatal illness of the workers. Most of the States have tried to meet the problem by a simple provision in the law that there must be 250 cubic feet of air space for each person, and that if the process of manufacture be a dusty one, air suction devices or fans must draw off the dust. This is an inflexible and inadequate solution of the question. The commission or administrative plan is much stronger and is well illustrated by paragraph 3 of Section 86 of the New York Act, adopted in 1913,—"The industrial board shall have power to make rules and regulations for and fix standards of ventilation, temperature and humidity in factories and may prescribe the special means, if any, required for removing impurities or for reducing excessive heat, and the machinery, apparatus or appliances to be used for any of said purposes, and the construction, equipment, maintenance and operation thereof, in order to effectuate the purposes of this section." This allows free play to the administrative officers, responsible for the execution of the law, to adopt any or all proper means necessary for its fulfillment. It has also been followed in the new Pennsylvania Act of 1913.

Another example of the strong authorities which are now being created to administer the State labor laws, is the Ohio Industrial Commission created by the Act of 1913. This body, which has three members, has been given all the combined powers of the six following departments: the Liability Board, which previously administered the workmen's compensation fund; the factory inspector; the examiners of stationary engineers; boiler inspection; labor statistics; arbitration and conciliation. The new commission will have control over all factories, shops, stores, telegraph and telephone offices, printing establishments, laundries, bakeries, hotels, depots, apartment houses, warehouses, churches, and the various infirmaries, hospitals, asylums and sweatshops. The Act requires these to be "safe" for both employes and frequenters. It marks an important innovation in labor law in that it authorizes the Commission to regulate the hours of labor of employes with regard to their health and welfare to such extent as the nature of the employment will reasonably permit, not inconsistent with law. These important provisions are a noteworthy step towards a satisfactory solution of the hours question. The fixing of hours like the settlement of any other industrial problem which involves constant and careful in-

vestigation, should be left to an administrative body and not attempted by the legislature.

Another admirable feature of the Ohio Act is that it provides for hearings by the commission on any of its rulings, such hearings to extend to the reasonableness of the orders. An appeal may be taken from the commission only to the Supreme Court of the State. This aims to prevent unreasonable delays and suspension of the commission's orders by the lower Courts. The commission is also authorized to make suitable rules and regulations for safety and health of employes in the various establishments and to maintain a museum of safety and hygiene in order that employers may be aided and kept in touch with the latest devices in this field.

**3. Workmen's Compensation for Accidents.**—When injured in the pursuit of his duties, shall a workman obtain compensation, and if so, how and from whom? In spite of its seeming simplicity this problem has never been solved in this country. Its import to the community is clear from the fact that many thousands are completely, and hundreds of thousands partially disabled every year by industrial accidents.<sup>1</sup> We must remember that most working families are living on the narrowest margin, and that even a temporary stop in earnings means immediate deprivation while a permanent or complete loss of earning power means acute poverty and destitution.

Three different answers to the question have been offered,—the old common-law suit for damages against the employer, in which the injured laborer was supposed to secure a verdict proportioned to the seriousness of the injury and the employer's neglect or fault in causing it; the modern Workmen's Compensation Act, which requires the employer to give the injured man a small or moderate sum, without a lawsuit and regardless of whose neglect or fault caused the accident; the system of State conducted insurance which collects from employers a certain tax or assessment based upon the danger of their industry and the size of their pay roll, and distributes this fund to the victims of accidents. In the first plan as set forth in the older laws and court decisions, the injured workman is unable to secure legal compensation from his employer without entering into extended litigation. The two have been pitted against each other in the courts in a legal battle which could not fail to embitter their relations and to create a dangerous feeling of class antagonism. In practice the injured man must prove:—

- a. That the employer was negligent,
- b. That this negligence caused the accident.

Naturally if he failed in either of these he lost his suit against the employer and thereby his hope of relief. The technicalities of the law provided further that the workman lost if the accident was caused by his own negligence or by the carelessness of a fellow em-

<sup>1</sup> It is estimated that over 75,000 persons are killed and many more injured seriously every year in American industry.

ployé, or if the accident was of such a nature as to be part of the "ordinary risk" of the business. These last three doctrines of "contributory negligence," "fellow-servant rule," and "assumption of ordinary risk," effectually prevented the vast majority of injured men from securing any award of damages in case of accident.

A serious weakness of this first system is its delay, expense, uncertainty and insufficiency. Any relief which is granted to a workman should be immediately extended. Otherwise the injured workman is confronted by physical incapacity, a great increase in his expenses for the effects of the accident and the simultaneous withdrawal of his wages. All of these coming together are usually sufficient to shipwreck the family finances of any but the most careful and far-seeing man on a higher standard of wages. This first plan therefore falls short in that it defers all relief until after a long jury trial with possible appeals to higher courts, retrials, etc. The case of *Kane v. The Erie Railroad*, 142 Fed. Rep. 682; 1906, was seven times before the Federal tribunals, four in the Circuit Court, and three in the Circuit Court of Appeals, but the family of the plaintiff were finally refused redress for the injury and death incurred by him while in the pursuance of his duty. The expense of the present system is due to the necessary employment of legal counsel and the court costs. In many accident cases counsel are paid by a contingent fee ranging from one-third to one-half of the amount which they may recover for the injured person. From the injured party's share is also deducted some necessary court expense. Where the case is appealed by the employer or where lengthy litigation follows, the cost is prohibitive to any injured workman. In practice most employers take out a policy of liability insurance in some large insurance company. This policy protects them against loss in case any court awards a verdict against the employer in an accident case. When a lawsuit arises the employer hands his case over to the insurance company which defends it, using its own counsel. One of the important results of this system is that the insurance company will often take advantage of every technicality of the law to avoid having to pay the accident damages which the court may award. These technical delays hold up the final decision of the suit and the workman soon finds that it would be cheaper for him to settle the case outside of court at a much lower figure than that to which he is entitled under the law. He does this to avoid appeals to higher courts and in order to secure a definite sum of money immediately, even though it be a small amount.

Equally harmful and injurious is the uncertainty of the law. As the law now stands the possibility of recovering damages is most uncertain,—technical questions either of fact, of procedure or of interpretation appeal with such varying degrees of force to different judges and juries, so that one claimant may succeed in winning sympathy or in concentrating attention upon the negligence of the employer, while another may fail in so doing and thereby lose his ver-

dict. As a result the same law is differently interpreted in different States and at different times in the same State. No system of relief for industrial accidents is adequate so long as serious elements of uncertainty enter into it. No injured workman nor his family can rely with confidence upon receiving, in case of such accidents, any part of the award of damages which he has a right to expect.

The insufficiency of the older "liability" system in our State governments is now generally recognized. The law covers only those injuries in which it can be proved that the cause was the negligence of the employer. The best conservative estimates show that legal relief is awarded in less than 10% of the serious accidents, and from this small proportion must be deducted those commissions, fees and other expenses which attend all litigation. The only reason for any system of employer's payments is to relieve the damages and distress caused by accident; judged from the standpoint of its purpose the "liability" plan is more than 90% a failure.<sup>1</sup>

**Workmen's Compensation.**—These considerations have led large bodies of citizens both employers<sup>2</sup> and labor unionists to favor a complete change.

It is now proposed that when a serious accident occurs, we should no longer delay all action while a long, uncertain, technical and highly expensive court trial is held, to measure exactly to what extent the employer and the workman respectively were at fault, but that some relief payment should be immediately granted to the victim or his family. This is the principle of the "Compensation Acts" of the National Government and some of the States. These provide that whenever a workman is injured in the course of his duties the employer shall pay him a certain sum definitely provided by the law and fixed according to the extent of the injury. No lawsuit need be held but a committee on compensation ascertains the extent of the injury and makes the award. The employer does not prove that the accident was caused by the workman's own negligence, or by a fellow-workman's carelessness, or by the ordinary natural risk of the business,—because none of these defences affect the case. On the other hand the workman, by accepting the law, agrees to limit the amount of damages demanded, to the exact sum fixed by the Act. These laws have reduced litigation to a minimum, have prevented the inordinate delays of the old system, and have increased the total sums actually received by injured persons.

The two forms of Compensation Act are the compulsory and the elective. The U. S. Bill of 1912 was compulsory, providing that railways and common carriers engaged in interstate commerce *must*

<sup>1</sup> To remedy this condition some large corporations have established relief funds to which they make contributions and the employes also contribute their dues. The vast majority of workmen, however, are not reached by these plans, and it has become necessary for the National and State governments to revise the law of employers' liability.

<sup>2</sup> The National Metal Trades Association has prepared an admirable investigation and report on this subject from the employer's viewpoint.



pay their injured employés certain fixed amounts, regardless of whose negligence caused the accident. The compulsory type would be unconstitutional in most of the States. The New York law of 1909 provided that employers engaged in business within that State *must* pay certain sums to their injured employés in case of industrial accidents, and irrespective of whose fault caused the accident. The State Court of Appeals declared this law invalid under the State constitution on the ground that when the legislature made the employer responsible for accidents *regardless of his carefulness or negligence*, it took from him his property in violation of the State constitution.<sup>1</sup> Since this interpretation of liberty and property over-

<sup>1</sup> In this case, *Ives v. South Buffalo Railway Co.*, 201 N. Y. 271, 94 N. E. 431; 1913, the Court said: "One of the inalienable rights of every citizen is to hold and enjoy his property until it is taken from him by due process of law. When our constitutions were adopted it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another. That is still the law, except as to the employers enumerated in the new statute, and as to them it provides that they shall be liable to their employés for personal injury by accident to any workman arising out of and in the course of the employment which is caused in whole or in part, or is contributed to, by a necessary risk or danger of the employment or one inherent in the nature thereof, except that there shall be no liability in any case where the injury is caused in whole or in part by the serious and willful misconduct of the injured workman. It is conceded that this is a liability unknown to the common law and we think it plainly constitutes a deprivation of liberty and property under the Federal and State constitutions, unless its imposition can be justified under the police power which will be discussed under a separate head. In arriving at this conclusion we do not overlook the cogent economic and sociological arguments which are urged in support of the statute. There can be no doubt as to the theory of this law. It is based upon the proposition that the inherent risks of an employment should in justice be placed upon the shoulders of the employer, who can protect himself against loss by insurance and by such an addition to the price of his wares as to cast the burden ultimately upon the consumer; that indemnity to an injured employé should be as much a charge upon the business as the cost of replacing or repairing disabled or defective machinery, appliances or tools; that, under our present system, the loss falls immediately upon the employé who is almost invariably unable to bear it, and ultimately upon the community which is taxed for the support of the indigent; and that our present system is uncertain, unscientific and wasteful, and fosters a spirit of antagonism between employer and employé which it is to the interests of the State to remove. We have already admitted the strength of this appeal to a recognized and widely prevalent sentiment, but we think it is an appeal which must be made to the people and not to the courts. The right of property rests not upon philosophical or scientific speculations nor upon the commendable impulses of benevolence or charity, nor yet upon the dictates of natural justice. The right has its foundation in the fundamental law. That can be changed by the people, but not by legislatures. In a government like ours theories of public good or necessity are often so plausible or sound as to command popular approval; but courts are not permitted to forget that the law is the only chart by which the ship of state is to be guided. Law as used in this sense means the basic law and not the very act of legislation which deprives the citizen of his rights, privileges or property. Any other view would lead to the absurdity that the constitutions protect only those rights which the legislatures do not take away. If such economic and sociologic arguments as are here advanced in support of this statute can be allowed to subvert the fundamental idea of property, then there is no private right entirely safe, because there is no limitation upon the

turned the whole Compensation Act, attention was directed to the amendment of the State constitution. In 1913 a clause was inserted in that document expressly permitting a compulsory law and a system of State insurance.<sup>1</sup>

Pursuant to this change, the New York legislature passed, March 16, 1914, a new workmen's compensation law classifying industries as hazardous and otherwise, and enacting a *compulsory* workmen's compensation for all hazardous industries. A State industrial commission decides claims arising under the Act and a State insurance fund is created by a tax on employers in hazardous trades. From this fund the sums awarded by the commission to injured workmen, are paid. The amounts fixed by law for each injury, under workmen's compensation, are much lower than would be awarded in a *successful* suit under the old employers' liability law, but the certainty of obtaining a moderate definite sum of compensation is a much greater benefit to the injured man than the remote possibility of larger damages. In order to prevent an injured workman from losing his compensation, through the bankruptcy of his employer, the newer State laws require the employer to take out insurance covering his liability for accidents. The best State system is a compulsory workmen's compensation without elective features. As to a State insurance fund, the employers as a rule oppose workmen's compensation laws on account of the greater expense of insurance; but, once the law becomes inevitable they prefer to have State insurance in order to reduce the cost.

**The Ohio Act.**—Following the adoption of the new State constitution and a temporary change in the party control of the State in 1912-13, Ohio enacted a series of advanced laws, notable among which was the Workmen's Compensation Act. This measure pro-

absolute discretion of legislatures, and the guarantees of the constitution are a mere waste of words."

<sup>1</sup> The terms of this clause which are broad and sweeping are as follows:

Section 19. "Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employes; or for the payment, either by employers, or by employes or otherwise, either directly or through a State or other system of insurance or otherwise, of compensation for injuries to employes or for death of employes resulting from such injuries, without regard to fault as a cause thereof, except where the injury is occasioned by the willful intention of the injured employe to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employe while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employes or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum: *Provided*, That all moneys paid by an employer to his employes or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer."

vides a State compensation fund which is secured from a tax upon employers, each employer and each industry being rated according to the danger of the occupation and of the particular factory or establishment. The rates are changed every six months if necessary. If an injured workman decides to sue his employer for damages, he may not afterward avail himself of the State compensation award, and the ordinary difficulties of litigation are such as to discourage suits. The Act applies to all occupations and the rates of compensation are fully one-third higher than in other States. It is a curious fact that both the Labor Unions and the Manufacturers Association of the State favored the bill before the legislature. It was vigorously opposed by representatives of the insurance companies, because it practically wipes out the employers' liability insurance business by turning this matter over to the State. The law provides for a small insurance fund of \$100,000, which is secured by setting aside 10% of the money received, until the figure named has been reached; after that, only 5% is taken for the fund as long as the State Industrial Commission deems it necessary to add to the fund. The purpose is to provide a reserve sufficiently large to take care of any unusual number of accidents.

The Ohio law is also unique in that it extends to public service companies and the various subdivisions of the State government such as counties, cities, school districts, etc.

Although the Federal law of 1912 contains the same principle as the former unconstitutional New York Act, the Federal Act would probably be upheld because the National courts are far more liberal in their construction of the "property" and "due process" clauses of the National Constitution than the New York court has been in interpreting the similar clause of its own State constitution. The Federal courts would be apt to hold that a compulsory act was a proper and legitimate exercise of the Federal control over commerce, or of the State control over local business. The Wisconsin courts have also upheld a compulsory law in that State as a constitutional exercise of the Police Power.

**The Elective Plan of Compensation.**—In order to avoid these State constitutional difficulties some of the States led by New Jersey have now passed elective laws, which give the employer the right to choose whether he will adopt the new compensation principle or retain the old employer's liability plan. If he rejects the compensation plan and decides to defend himself under the liability law he is deprived by the new laws of his former technical defences—"fellow-servant negligence," "assumption of risk" and "contributory negligence." None of these will excuse him. This makes his defence more difficult and induces him to accept the compensation principle with fixed payments of small amount. This elective plan avoids the difficulty of unconstitutionality in that no employer is forced to make the compensation payments regardless of his fault, but has the right to his legal protection in court if he so

prefers. This raises the interesting question—can the legislature constitutionally deprive the employer of his technical defences in the fellow-servant, contributory negligence, and assumption of risk rules? Is this not also “depriving him of property without due process of law”? To this the courts have answered no. The three legal rules mentioned are not legislative statutes, nor constitutional principles but are ordinary doctrines evolved by the courts in interpreting the common law of negligence. They are not the only means by which this law could be interpreted and if the law itself were changed they too could be changed or repealed. “No man has a vested interest in the common law.” In 1911 the Massachusetts legislature referred to the State Supreme Court the Workmen’s Compensation bill, which abolished the employer’s defences in the three rules mentioned, and asked whether such a bill would be constitutional or whether it would deprive the employer of his property without due process of law. On July 24th, 1911, the court rendered an opinion, 209 Mass. 607, holding that such a law would be constitutional. “The rules of law relating to contributory negligence and assumption of risk and the effect of negligence by a fellow servant were established by the courts, not by the Constitution, and the legislature may change them or do away with them altogether as defences.”

Several States have already adopted the elective plan in whole or in part. In New Jersey the law provides for a fixed scale of payments, to be made to the workman according to the injury suffered and the partial or total disability which it causes. Every workman and every employer therefore knows in advance that the loss of an eye or limb results in the obligation of the employer for a fixed compensation. This compensation is not as high as it should be but the amount may be increased as a result of future experience. In Wisconsin a compulsory plan has been adopted providing for a payment of 65 per cent of the average wages of the workman in case of total disability with lesser amounts for partial disability. Other States are following the lead of those two commonwealths and the old system is slowly giving place to a modern and more definite principle. In all the new laws the employer is excused from his obligation if the accident is caused by the workman’s intoxication or willful act.

Most employers under both the old and new laws protect themselves by taking out “Liability Insurance,” in which the insurance companies agree to reimburse the employer for any damages or compensation which he may have to pay because of injuries to his workmen. The premium paid by the employer for this insurance is fixed by the company according to the strictness of the law, and the risk of the business.<sup>1</sup> Such insurance is now a necessity for every employer of labor.

<sup>1</sup> The cost of insurance under workmen’s compensation laws ranges from 50% to 200% higher than under ordinary liability law.

**State Insurance.**—The State of Washington has provided by law for a public insurance system in certain dangerous industries. Each employer pays to the State a fixed tax according to the risk of his business and the number of his employés and these payments form an insurance fund for the benefit of injured workmen. The fund is administered by the State government and the exact amount paid to injured persons is fixed under a scale of rates similar to a compensation act. A few other States are now experimenting with the insurance plan.

For constitutional reasons all of this legislation on industrial accidents has thus far been confined to the States, for they have the exclusive power to legislate on manufacturing industry. The Federal Government has passed a workmen's compensation act covering injuries received in interstate commerce, chiefly on the rail-ways. Since the great majority of accidents occur in manufacturing concerns the State laws are the principal means of regulating this question. But is State regulation desirable? As long as we have 48 separate commonwealths in no way bound to co-operate with each other on this problem, we may look for serious difficulties in reaching a just solution. There is probably no government question before the people to-day which so intimately touches the personal welfare of the masses of workmen as the protection against industrial accidents and the poverty and distress flowing from them. It is eminently unfair to the employer and the worker alike to relegate the solution of this question to the State legislatures. By so doing we place a penalty upon the manufacturers located in those States which have a high standard of laws and of executive enforcement. Since labor cost in all industries forms a large proportion of the total cost of production, and since the standard of employers' liability and of workmen's compensation materially raises or lowers the labor cost, it is clear that any legislature which passes an adequate workmen's compensation law does so with the foreknowledge that it is thereby raising the cost of production of its manufactures, and thereby directly discouraging its own industries unless other States adopt the same standard.<sup>1</sup> The representative of a large corporation testifying before a congressional committee has stated that in one eastern State his corporation was obliged to pay damages in only two per cent of the accident cases occurring in its plants. Such a condition of the laws forms a serious barrier to social progress and tends to increase and intensify the bitterness of class feeling by causing a belief that both legislative and judicial authority are failing to protect the interests of all classes with fairness. This thought has led many observers to

<sup>1</sup> When the compensation bill was before the Pennsylvania legislature in 1913, reliable testimony was given showing that because of the great difference in wages and other expenses between the soft coal mines of Pennsylvania and West Virginia, the passage of the bill would mean the extinction of certain Pennsylvania companies.

look towards the German system as a desirable policy. The German plan abandons completely State control of accident legislation, vesting this power in the National Government. The employers in each industry are obliged to band themselves together in associations which administer and pay the costs of accident insurance. This accident insurance covers every workman in the industry and is paid to him in regular weekly amounts without legal dispute, as soon as the injury is officially confirmed. The rates are uniform throughout the German Empire, being based on a percentage of the average weekly wages which the workman had earned in recent years. Since the costs fall on the employers as a whole, no one employer is so heavily damaged by an accident as to lose his business existence, yet the pressure of the whole employers' association is brought to bear to prevent accidents by every reasonable means in order to keep down the assessments which are necessarily levied on the employers to cover the cost of the insurance. The disadvantage of this plan is that it encourages a large number of disputes over the amount of pension to be granted, and many cases are taken up to the higher authorities on appeal, so that it involves much red-tape and procedure. The authorities on their side have also been inclined to administer the law in such a liberal spirit as to make it a form of charity. Despite these defects, however, the German system offers the practical advantage that the injured person is not required to spend a large proportion of his relief funds in attorney's fees, court costs, and protracted litigation.

**National Government Plan.**—Mr. Miles M. Dawson, a prominent insurance actuary, has suggested that the German plan be modified to fit American conditions. He proposes a Federal Government tax on all industrial establishments, the tax to be regulated according to the number of workmen employed and the risk of the industry. From this a fund is to be created which shall be managed by the Federal Government, for the benefit of injured employes in each industry. Upon this simple and inexpensive basis Mr. Dawson proposes that there shall be established a National Workmen's Insurance system, which shall gradually be extended to cover all the chief industries of the United States, and shall later be enlarged in scope to include sickness and other forms of insurance. He urges that the plan is constitutional, because it is based primarily on the taxing power of Congress which, as we have seen, may be used for the general welfare. Although Congress may not regulate matters which have not been given to its jurisdiction by the Constitution, it may tax and may devote the proceeds of taxation to such purposes as it pleases in the general welfare. Mr. Dawson claims that insurance against industrial accidents would be such a purpose, and that the funds from Federal taxation levied in this way might be appropriated for such a purpose. On the other side, however, it must be admitted that some regular machinery for the measurement of the risk of each industry, the nature of injuries

received by workmen, the regulation and settlement of cases of compensation and many other similar duties would be necessary. The whole purpose and effect of the system would be to regulate certain industrial conditions which by the Constitution have been left exclusively to the States. In order that the Federal Government shall either itself manage or even regulate insurance, a constitutional amendment is undoubtedly required.

Against any form of State or Government-managed insurance it is forcibly urged by representatives of the insurance companies that—(a) Political pressure would inevitably be brought to bear to increase the amount of money to be paid in cases of accident to an undue extent. No political party would be able to withstand this pressure. The leaders in rival parties would soon seek to catch “the labor vote” by advocating greater and greater insurance payments in accident and sickness, until the whole Government insurance plan would become a crushing burden upon industry.

(b) The adjustment of insurance claims it is urged, requires the interplay of conflicting interests. The private companies now make a special study of these claims and know how to investigate with care each individual case, and to keep down the amount of payment within proper bounds. How could the Government do so?

(c) The stimulating influence of competition between private companies would also be removed, the expenses of management would soon mount up, the lack of effective supervision would make itself felt, and a government system would soon cost the insured more than under present conditions.

Whether the National Government should undertake the direction of a general insurance plan of this kind is a mooted question but undoubtedly its regulative authority should be enlarged by constitutional amendment to cover the regulation of the whole field of insurance, including the problems of compensation for industrial accidents. There can be no doubt that this would offer the most uniform, equitable and efficient solution for all interests concerned.

**Sickness Insurance.**—Even more serious than industrial accidents are the effects of illness and premature death of the family head. Many sociologists have pointed out that if some effective means of meeting this danger could be found the families of wage-earners could be kept together, the wife or widow would be able to continue her care of the children and the latter could remain in school until they had secured a training for better paid positions. Professor Henry R. Seager who is a leading authority on this question, has shown <sup>1</sup> that all the leading nations have progressed far beyond us in its solution. “Through organized illness insurance, obligatory and all-embracing, such as Germany has had since 1883 and the United Kingdom is just beginning to have through the national insurance act of 1911, the burden of illness and premature

<sup>1</sup> In the *Annals of Political and Social Science*, July, 1913.

death which now falls with crushing weight on the individuals and families affected, can be in part lifted and in part shifted. Under the systems of these countries, illness for the wage-earner no longer means income cut off at the very time when necessary expenses are increased by doctor's bills, medicines and special dietary. Instead, on the one hand, part of the previous wages continues to be received by the family, while on the other, organized and systematized machinery for restoring the victim of the illness as quickly as possible to health and full earning capacity is set in operation. The United Kingdom, as one feature of its illness insurance system, will have a fund of \$5,000,000 a year to spend on hospitals and sanatoria. Germany in consequence of her more prolonged effort has seen the death rate reduced from 10 to each 1,000 wage-earners insured in 1888, to only 7.8 to each 1,000 in 1907. Neither one of these systems operates perfectly. On the basis of European experience it should be possible for us to introduce a still better system of illness insurance here. But when we do so we shall experience the same beneficial effects as regards relieving the congestion in the unskilled and underpaid labor market that Germany has experienced."

**The Wage Rate.**—The minimum wage proposal is a new one in American government. In England for many centuries the county courts were authorized to fix farm wages at their quarterly sessions, and a statute of Elizabeth's reign provided minute, detailed rules as to hours of work, wages, meals, periods of rest during the day, etc. This was in line with the other laws of that time which regulated prices, quality and size of cloth and other staple articles. The reaction against all forms of government regulation swept away price, quality, size, labor hour and wage regulation and ushered in the complete free trade, free labor era in England. It was this principle of individual freedom that was adopted by the early American States as best suited to their farming interests and to the scarcity of labor and capital and the abundance of free land. In a new country the laws always allow the greatest liberty to the individual,—if they do not, those elements which are dissatisfied move on to the free lands on the frontier. So it has been until about 1880 in America, the steady surge Westward not only made the Western States more liberal to the individual and more careful of his rights but also strongly influenced the Eastern commonwealths and still leads them to adopt many Western principles.

Until lately we have believed in the utmost legal freedom in wage rates and other prices, allowing workmen and employers to deal together as they chose. The beginning of a change is marked by the appointment of Wage Commissions in several States, commencing with Massachusetts. Most of these Commissions have no authority to fix wages by an official ruling but they are charged with the duty of inquiring into wage conditions in all parts of the Commonwealth, and wherever they find a prevalent scale of wages which is so dangerously low as to threaten the health or morals



of the women<sup>1</sup> employés, the Commissioners may, after suitable hearings and investigation, declare that the rate *should* be raised to a given figure. The employer need not accept this figure and it has no binding legal power; but, as the opinion of a disinterested impartial body, appointed by the State, it commands the force and backing of public opinion and frequently brings about an immediate change. The Massachusetts Commission is permitted to ascertain and publish the names of those employers who do not conform to the minimum rates as determined by the Commission,—the purpose being to strengthen the influence of public opinion in such cases.

The other and more advanced type of law is well illustrated by the Wisconsin Act of 1913 which is the most noteworthy measure on this subject thus far enacted in the United States. It provides that "Every wage paid or agreed to be paid by any employer to any female or minor employé, except as otherwise provided in Section 1729s-7, shall be not less than a living-wage." A living-wage is declared to be such compensation as shall be sufficient to enable the employé to maintain herself in reasonable comfort, decency and physical and moral well-being. "Any employer paying, offering to pay, or agreeing to pay to any female or minor employé a wage lower or less in value than a living-wage shall be deemed guilty of a violation of the statutes." The law is enforced by the Industrial Commission which receives from all employers who have three or more female or minor employés, a statement of the name, sex, age and wages of such employés, the nature of the work that they perform and such other information as the Commission may require for its official duties. Upon the basis of these reports from employers the Commission makes a classification of the conditions in each industry. When a complaint of excessively low wages is made, the Commission investigates and if it finds reasonable cause to believe that the rate is below the safety line, it appoints an advisory board composed of representatives of the employers, employés and the public, which assists in the further investigation and determination of the case. With the aid of this board the Commission then hears the evidence on both sides and fixes a minimum rate or living-wage for all women employés or minor employés within the class. In order to prevent the exclusion from employment of partially disabled workers or those who are

<sup>1</sup> The low wage rate is a question of peculiar importance to women; most of them do not intend to remain permanently in employment, or they work in order to supplement the family income—not to support themselves entirely—and for these reasons they will accept a lower wage rate than men can afford to take. Also they do not provide themselves with the technical training which would otherwise be necessary. When they apply for positions as unskilled workers, willing to take whatever employment they can secure at whatever terms are offered, they necessarily are given wages at such a low rate that those who have no family aid soon find it difficult if not impossible to live in comfort and health upon their earnings and lay by a reserve for the future.

unable to work full time at their callings the law provides that such as are not able to earn the living-wage may be specially licensed by the Commission to work at a special rate. Other exceptions under unusual conditions may also be made by the Commission. A violation of the statute by the payment of lower wages than the rate fixed by the Commission is punishable as a misdemeanor.

While most of the States which have adopted minimum wage laws have provided like Massachusetts for publicity by a State Commission which *investigates* wage rates, in Oregon the law has been given a compulsory feature resembling the Wisconsin statute.

The State Commissioners have investigated the wages paid to 7,000 women in Portland and 1,100 in other parts of the State and after tabulating the results have recommended a compulsory minimum wage. The law applies only to women and children and forbids their employment in any calling which may endanger their health or morals. It also prohibits the payment to them of wages which are inadequate to supply the necessary cost of living and to maintain them in health. The minimum of wages, the maximum of hours, and other conditions of labor are fixed by an Industrial Welfare Commission, which is given full power to investigate and to supervise local investigations which are conducted by special committees. When a local committee recommends a minimum wage for women and children in any district or industry, this rate of payment becomes binding only when approved by the commission.

A careful examination of the Massachusetts and Wisconsin plans shows that many popular ideas concerning the living-wage laws are mistaken. Such laws apply only to women or to women and minors, because these are peculiarly subject to the care and protection of the State. Again the acts do not provide an *average* wage but only a *minimum*; they do not regulate the pay of the great majority of workers but rather of that class which are so clearly below the level of subsistence and decent well-being as to convince an investigating body of the fact. Finally the laws do not either compel or prevent the employment of anyone. Every employer is at liberty to take or discharge any person whom he selects; he is restricted only in that he cannot pay less than will support a human being under ordinary conditions.

The need for legislation of this kind is due to the important changes through which manufacturing and retail business is now passing,—the effort to-day is to produce and market an immense output at a low price, rather than a small total at a high price. This new policy means the employment of immense quantities of unskilled labor and of machinery, so that a chief item of expense is the unskilled pay roll and when the labor of foreigners and of women and children is offered at a reduced figure, the employer eagerly welcomes it as a means of competition in the keen struggle in which

he is placed. One employer having done so, others in the same locality perforce must follow and there soon spreads through a whole section or even an entire industry the low wage level that we have seen in many of our mill districts. Most employers would prefer not to compete on this basis; if given the choice, they would take on workmen with a higher standard of living and pay them normal, reasonable wages, but they are not given the choice. Low freight rates, wide markets and large production mean that each producer must be prepared for competition from areas far distant from his plant. The foreigner accepts less because he is accustomed to a low standard of living and willing to take what is to him a great advance over European wage rates; the woman and the child are part of a wage-earning family. They can compete at lower wages because they measure wages by what the whole family earns. In this way certain unskilled, unorganized masses of labor either find their wage payments nearly stationary in the face of steadily increasing cost of living or else actually falling in amount. It was shown in the strike at Lawrence that unskilled foreigners who had families dependent on them, were in some instances earning \$6.25 weekly. The publication of these and similar facts has led to the appointment of numerous legislative committees, and these in turn have discovered further evidence of the wide extent of the condition. The constitutionality of a compulsory law like that of Wisconsin has not yet been established but it could probably be shown to be valid on the ground that it did not limit the liberty or property of the individual except for the purpose of protecting the health and safety of women and children,—a purpose which has often been recognized as constitutional in other State laws. It is as yet too early to see the full results of the Massachusetts and Wisconsin types of laws; both plans must be judged, neither by the claims of their friends nor the fears of their opponents, but by the practical benefits or disadvantages which they produce. The Massachusetts or publicity type is to be strongly preferred over the compulsory system if public opinion is active, well informed and vigorous. In Great Britain, Parliament in 1912 passed a minimum wage act for coal mining, chain and box manufacture, which provided for local wage boards and authorized them to determine in each instance the minimum rates to be paid. The principle is an extremely radical one and is regarded by all as a last resort to be used only in case all other measures fail. It was brought about by the desperate conditions of the three industries mentioned, in which a large number of persons were reduced to destitution by the lowering of wages and the increase in cost of living. The law has been successfully applied in both the chain and box industries. It is clear, however, that in many other lines of business the law would give no relief because the workers are already paid a living wage and their poverty comes from irregular employment and long periods of enforced idleness. The problem here is not a governmental one,

nor is the solution a compulsory higher wage rate but rather the provision of some supplementary employment to fill out the worker's time and income.

**Cash Payment of Wages.**—Many corporations formerly paid their employes part or all of their wages in orders upon a store, run by the company. This is frequently done in the mining regions where the miners sometimes live at a distance from village stores. The men object to this practice, claiming that a high scale of prices is charged which actually makes their wages less than the face value. On demand of the unions most of the mining States have passed laws requiring corporations to pay wages in cash, but in some of the States these laws have been held unconstitutional as interfering with the freedom of contract. Another similar law has been directed against the practice of reserving part of the wages as a deposit, or as security, or as a deferred payment, which keeps the laborer from leaving without notice or engaging in strikes. Several States have passed Acts requiring the payment of wages at least semi-monthly, to prevent this custom and while some of the State tribunals have held these also to be violations of the liberty and property rights of the contracting parties, others have upheld them as protections of the laborers against injustice.<sup>1</sup>

**Unemployment.**—In calculating the wages of labor, we must remember that in all trades and occupations the dull period often causes extended loss of work—the less the skill required, the greater the irregularity of work in most of the industries. In America little has been done outside of New York, Massachusetts and Wisconsin to assist a worker in this important question, but in foreign countries an extensive system of free employment bureaus has been organized with the best results—Great Britain has already provided by law for 450 labor exchanges; in the first three months of the organization over 63,000 men and boys and 23,000 women and girls were located in employment. These bureaus also render an important service by collecting and publishing official information as to the occupations that are overcrowded, and those in which a demand exists. Great Britain in 1911 took a further step by enacting a law requiring insurance against unemployment—this Act governs some 2,500,000 employes—the cost of the insurance is paid partly by the employer, partly by the workman, and partly by the Government. All laborers who are out of work must register with the public employment bureau; refusal to accept employment at the wages of their usual trade, results in a stoppage of insurance benefits.

**4. Settlement of Labor Disputes.**—Our State governments are

<sup>1</sup> The constitutionality of such laws has been upheld by the Supreme Court in *Erie Railroad v. John Williams*, 233 U. S. 671, 1914. The Erie Company claimed that the New York law requiring the semi-monthly payment of wages to its employes was an interference with its property and liberty under the 14th Amendment. The court ruled that while there might be some extra expense connected with such payments, the State had a constitutional right to regulate the matter as a protection to those who worked for a living.

commencing to render most valuable service in the settlement of strikes and lockouts. The waste from such disputes, it has been estimated, equals the loss by fire, and exceeds \$200,000,000 every year. Most of this sum might readily be saved to workers and their employers; one of the best means of doing so is not by State action at all but by the voluntary arrangement between labor union and employers' association to submit all controversies to a joint arbitration committee, under what is called a "trade agreement." These trade agreements have been formed in a great variety of industries and cover the rate of wages, hours, apprenticeship and other conditions of labor. The great advantage of this plan is that it leaves open to dispute as few questions as possible and promotes amicable relations on both sides. Whenever a difference arises it is automatically referred to the joint committee which decides the matter, usually by a compromise. A still better voluntary plan has been perfected in certain branches of the clothing trade in Chicago and New York where even the smaller grievances in the shops are immediately taken up by a labor expert, paid by the employer, and a just and satisfactory solution found if possible, with an appeal, if desired, to the arbitration committee. This second plan is based on the sound principle that the immediate "smoothing out" of petty differences is the most effective way of avoiding serious disputes. It has proven highly satisfactory in the cities named and is being copied in others. But aside from these plans, originated by private firms and individuals, there is urgent need of some public authority which shall aid actively in the decision of labor controversies. If all employers were well informed and able to make use of up-to-date methods of co-operation among themselves, no public action would be necessary, but a majority are not, and in consequence our private and voluntary means of preventing industrial strife are still archaic and ineffective. Such strife is still in the condition of justice in the dark ages, when parties to a lawsuit were allowed to fight out their battles before the court. This has led Congress and the more progressive State governments to establish boards of arbitration and conciliation to which disputes may be referred as to an impartial tribunal. Massachusetts has led the way by the Act of 1886 amended and codified in 1913; this law sets up a Board of three members, chosen by the Governor, one from an association of employers, one from a labor union and the third on recommendation of the first two. They are paid \$2,500 yearly and appoint a paid secretary. An important feature of the plan is the employment of expert assistants by the Board to investigate trade and labor conditions affecting any dispute. These are usually nominated one for each side, by the parties themselves, but the Board may also appoint others if it sees fit. Such experts have proven a tower of strength in fortifying the Board's position on all disputed points and in acquainting its members with the salient facts in each controversy. Armed with the information so secured and with the authority to summon witnesses and take

testimony under oath, the Board is well qualified to render decisions which will command the respect and confidence of both sides. Its work is of two kinds, (a) conciliation, that is the bringing together of the parties so that they will themselves find a settlement of the affair; and (b) arbitration, which is the decision of the affair, not by the parties, but by the Board. The Board's first effort is to conciliate. When notified of an impending strike or lockout the Board at once offers its services as a mediator and tries to persuade both sides to settle the matter amicably between them, or, failing this, to submit it to arbitration. It may also investigate the causes of the difficulty and render a public report with recommendations, showing what steps should be taken or changes made to secure peace. The effect of such a public report is usually to force an arbitration of the question at issue. If the parties agree to arbitrate they sign an application to the Board accompanied by a written promise to abide by its decisions and to continue in business or at work until the decision is rendered. The Board then proceeds to the spot and holds public hearings, making a final decision within three weeks. This decision is published and recorded with the clerk of the city or town concerned. It is valid for six months unless either party gives a written notice of 60 days that it will not be further bound by the award. No arbitration is undertaken in any case which is in the courts, nor can any case be arbitrated without the consent of both sides. If the parties prefer they may take their disputes to a local board of arbitration composed of one arbiter appointed by each side and a third by the other two; the decision of such a local board is binding in the same way as that of the State Board. The Massachusetts system has been strikingly successful. The Board's influence has been persuasive, not compulsory; it has steadily and insistently urged the parties to form trade agreements and has thereby sought not only to settle the cases before it but to forestall and prevent a large number of future controversies. Even in the most difficult and trying conditions of the Lawrence textile strike, in which an intolerably low level of wages, a violent, revolutionary labor organization, and the mutual distrust and fear of the employers made it impossible to secure any co-operation towards a general settlement, the Board was able to obtain an early adjustment of the dispute in the mills of the largest company concerned. In 1910 there were 208 cases of arbitration, in 1911, 175 and in 1912, 115. There were many more instances of mediation by which serious controversies were avoided. A brief summary of two cases will make clear the methods and the value of the Board's work. The employes of the Boston Elevated Railway were solicited to join a union by an organizer of the "Amalgamated Association of Street and Electric Railway Employes of America." The following events then occurred in rapid succession:

A small number enrolled in the union,

Company officials seek to prevent formation of such a body,

## THE NEW AMERICAN GOVERNMENT

ed forty-nine men discharged without explanation  
unsatisfactory service,"  
ing of employés votes to strike,

n,  
l investigates,  
at men were discharged for joining union and that  
s were running the cars in an objectionable way,  
ls arbitration or amicable agreement,  
ferred by both sides to State Board,  
effected.

of a different nature arose in the Holyoke mills of the  
ting Paper Co. and the Central Labor Union of that  
the mediation of the Board. The facts and settlement  
orm were as follows:

install a more efficient system, and it was feared that in  
of team work two girls would have to do the work of

stem increases output 50% per capita,  
r 25% increase in wages,  
declines,

ferred to another mill,  
also in second mill,  
hen employés strike in sympathy,  
ke feared in all departments,  
views both sides and arranges conference,

the scene of the difficulty and a brief report of findings of fact and recommendations for a settlement is made. This report is published at once and the decision which it recommends then becomes a basis for intelligent public opinion. The report of the board is binding on nobody. It is simply a statement to those concerned and to the public, that an impartial official body with full power to investigate, has examined the facts and recommends a solution. Its usual effect is to force an early settlement along the lines laid down in the report. It will be noticed that the Canadian law forbids a strike in a public service industry until notice is given to the Labor Office. Such a provision could probably not be placed in any American law on the subject because it would interfere with the liberty of the individual and would thereby violate the 5th or the 14th Amendment to the Constitution of the United States. But the Massachusetts Act, already described, secures many of the advantages of the Canadian plan by requiring mayors of cities and towns to notify the State Board of any impending labor controversy in their localities, which has or may become serious, and by authorizing the Board of its own initiative to investigate and report and publish its findings.

In New Zealand a compulsory plan exists, under which the dispute is first investigated by a local district board of conciliation which tries to secure a voluntary agreement between the parties. If this effort fails the case goes to the central court of arbitration where it is decided with much the same binding force as a lawsuit. Either party may make the application to the court and the other is obliged to join in the proceedings of arbitration and be bound by the decision. This system also would be unconstitutional in America because of its compulsory feature, which would violate the "liberty and property" clauses of the 5th and 14th Amendments. Many employers and labor leaders are opposed to compulsory arbitration, while some union officials are even opposed to any form of arbitration which will interfere with the right to strike at any moment. They oppose any binding form of decisions which for a given period, such as six months, forbids a reopening of hostilities, their reason being that a court or arbitral decision which compels the workers to remain at their labor for such a period is in substance a revival of serfdom. Regardless of this objection and of the constitutional obstacles in the way, compulsory arbitration would not prove feasible in this country because of the impossibility of enforcing a decree or decision against the workers. If the employer violated the decision in a compulsory suit forced on him against his will, he could be compelled to observe it because his property could be seized; but if a like event occurred to the laborer he could immediately cease work and no arbitration award nor court decree could force him to resume it. Our courts of equity which enforce contracts when necessary, have repeatedly declared that they have no means of compelling the performance of a labor contract because it is impossible for the court



to force a worker to perform satisfactory service to his employer, the court cannot watch over the worker's every act. Above all such a compulsory service would be a violation of the 13th Amendment which forbids slavery or involuntary servitude. Nor could the employer collect damages from the worker because the latter would usually be found to have insufficient property.

**The Worker's Legal Status.**—The laborer has demanded and received a special legal position in certain cases, especially in his claims for wages. For example a carpenter or mechanic who has worked on a building but has not received his wages, has a claim against the real estate which takes priority of everything except taxes. This "mechanic's lien" as it is called, exists in all the State laws and is an effective method of protecting the worker's interests in the building trades. In suits for debt against laborers their tools of trade are also exempted from seizure by the creditor. In some of the States the new liability and compensation laws require the employer to take out liability insurance to cover the cost of claims which his workmen may legally have under the new laws. This is done because an insolvent employer would be unable to pay such claims, which would leave the injured workmen without legal compensation. Such a claim now becomes valid against the insurance company. The representatives of labor also demand still further protection from the law in the shape of a complete change in the methods of granting injunctions in labor disputes and in the punishment for violation of these injunctions. This demand has been considered in the Chapter on The Judiciary. In the national field of legislation the Clayton Act grants or appears to grant the demand of some labor leaders that injunctions shall not issue in certain labor disputes and that boycotts between laborers and their employers shall be legal when applied to interstate business.

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#### QUESTIONS

1. Point out the main aspects of the labor problem which now face the State governments.
2. Why should the State intervene to regulate factory conditions?
3. If you had a model factory with good, sanitary conditions, would you favor State factory inspection? Why?
4. Explain the chief purpose of factory legislation.
5. Outline the executive authority which enforces the laws in your State.
6. What is the difference between your State system and that of others described in this chapter?

7. Give a brief sketch of the usual provisions regarding dangerous machines.
8. Of those on ventilation.
9. Of those governing decency, modesty and morality.
10. Those governing safety in case of fire.
11. Those on child labor.
12. A State law provides that children over fourteen may work in factories if their age is attested by their parents in an affidavit. What are the practical weaknesses of such a law?
13. How are the hours of labor of women regulated?
14. A uniform child labor bill is proposed for all the State legislatures. What would be your views as to its desirability?
15. What are your views as to the State constitutional authority to limit the hours of labor of men in dangerous industries? Why?
16. In safe industries. Why?
17. Explain what is meant by a "sweatshop" and outline the usual provisions of the laws governing it.
18. Why is the "sweatshop" especially dangerous to the laboring class?
19. Why is it difficult to regulate?
20. Ought the State to attempt to regulate this question? Reasons.
21. Explain the general weaknesses of factory inspection.
22. At a public hearing before a legislative committee, various methods of factory inspection are proposed, one of them being to prescribe in detail in the law itself the various rules, regulations, nature of safety appliances, ventilation, sanitation, etc. What would be your attitude toward this plan and why?
23. What other possible system of factory regulation might be adopted. Examples. What would be your attitude towards it?
24. Why is the question of damages for industrial accidents so generally discussed in America to-day?
25. Explain the three most important solutions of the question thus far attempted.
26. What is meant by the employer's liability plan?
27. What is contributory negligence?
28. Explain the fellow-servant rule.
29. Explain the doctrine of assumption of risk and its effect on the recovery of damages by the injured man.
30. How far does the employer's liability system satisfy reasonable requirements as to the *time* of securing early relief in a meritorious case? Amount of damages awarded? Certainty of award?
31. Explain the workmen's compensation plan.
32. Summarize the Federal Act of 1912 on this subject.
33. Explain the difference between compulsory and elective compensation acts.
34. A State constitution guarantees life, liberty and property with due process of law. The legislature passes a workmen's compensation act providing that upon injury to a workman in a factory the proprietor must immediately pay the injured man a fixed amount determined by law, regardless of whose fault caused the injury. Is this valid under the State constitution? Cite an authority.
35. How has the New York constitution been changed to provide for a compulsory act?
36. Explain the Ohio and New York laws.
37. How has the constitutional difficulty been avoided in the elective plan of workmen's compensation?
38. Explain the New Jersey system.
39. What are your impressions of State insurance as represented by the Washington plan?
40. What are the objections urged by insurance men against State insurance?
41. Outline the proposal for a National Government system of working men's insurance.
42. Resolved that the Federal Constitution should be amended to allow Congress to regulate insurance. Defend either side.

43. Explain the need of sickness insurance for working men and outline the plans which have been adopted in other countries in this field.
44. What is a minimum wage law?
45. Why and how has it been adopted in England?
46. Explain the particular importance of the problem for women.
47. Summarize the Massachusetts Act, giving the powers of the commission.
48. How does this differ from the Wisconsin law?
49. How does the Wisconsin Act affect those persons who cannot work full time?
50. Why is the low wage rate attracting greater attention under modern conditions of production and marketing?
51. What are your impressions as to the relative value of the Massachusetts and the Wisconsin types of minimum wage law?
52. Explain the need for cash payment of wages which has led to State laws on that subject.
53. What can the States do and what have they done to relieve unemployment?
54. Can a State government aid in the settlement of strikes and lockouts?
55. What is your impression as to the need for such action?
56. Outline the chief features of a State plan of mediation and arbitration.
57. In a debate you are advocating a State system of arbitration. Outline your argument, with the powers to be given the State authority and show from actual experiences of a State the advantages of your plan.
58. Give some examples of successful State arbitration.
59. How does the system affect the public?
60. Summarize the Canadian Industrial Disputes Act and give your impressions as to its success.
61. Outline the New Zealand plan and show how it differs from the Canadian and Massachusetts systems.
62. Would the Canadian or the New Zealand plan be constitutional in an American State? Reasons.
63. Prepare a report on State arbitration of labor disputes showing what our system is and any possible improvements that might be made in it.
64. Are laborers and mechanics given any special status under our laws? How and why?
65. Have their unions any special exemption from the Federal anti-trust law?
66. What are your impressions of the justice of this exemption?

## CHAPTER XX

### THE STATE—Continued THE STATE AND EDUCATION

**The Modern Basis of Public Education.**—That rapid transformation in our school and college system which is now attracting such wide attention is mainly due to two new ideas,—first, we now see that advanced “schooling” is not an advantage for those who can afford it but a necessity for all classes, so that we are taking steps to open up the higher and highest grades of secondary and college work to the humblest citizen; second, we have discovered that no one fixed rigid group of courses is “education,” but that many new subjects offer a training of the highest value. These two changes in our thought have enlarged the duties and service of the State government to surprising proportions. In 1910, the latest year for which statistics are available, there were enrolled in the public schools 17,800,000 pupils, or 71% of the persons of school age. The average attendance was 12,800,000. The teachers numbered 523,000, of whom four-fifths were women. The average payment of women teachers was \$53 monthly; of men \$68. The value of school property was over one billion dollars, and the expenditures for the year were \$426,250,000. This expenditure represents \$4.64 per capita of the population, or \$33.34 per pupil in attendance.

We are also encouraging each individual to spend a longer time upon his schooling and we now see that even adults can profit by vocational studies and advanced technical courses. At the same time the number and variety of subjects to be taught has broadened out until there are at present few fields of human knowledge which are not included in the programs of the State supported institutions. More of us are “going to school,” we are going for a longer time and are studying an endless variety of new subjects with great advantage. Literally the nation is now in training.

**The Subsidy System.**—To satisfy this new demand, the States have built up and strengthened their administrative machinery by many devices chief among which are the State subsidy to local school districts and the State minimum standard for all local schools. The effect of these has been to extricate the weaker school districts from hopeless poverty and inability to meet the new demands, on the one hand, and to bring order and system out of the chaos of local inefficiency, on the other. The State Board of Education or the Superintendent recommends for a share in the

State appropriation, those districts which have kept their local schools open for a sufficient length of time during the year, and have maintained adequate standards and teaching force in the subjects required by the State. Sometimes the State appropriation equals one-third of the whole local school expense. This large subsidy from the State treasury is an essential item in the income of the local district and no effort is spared to satisfy the prescribed standard, and to share in its benefits. This plan, which is adopted from the English "Grant in Aid" system, has become necessary because of the extreme and *bumptious* independence of the local district authorities, which resisted all other efforts to raise the standard, while the legislature on its part was unwilling to force a change by compulsory methods.<sup>1</sup> The plan would work far more effectively if the State Superintendent were more freely furnished with his own agents to inspect the local schools and if we could rescue our local school administration from the handicap of party politics. Some of our Commonwealths in addition to the subsidy plan have tried further means of securing efficiency.

**The New York Plan.**—The System adopted by New York has had an excellent influence upon the public schools. This is a central board of regents with authority to grant, alter and revoke the charters of universities, colleges, academies, etc., distribute to them the funds appropriated by the State, inspect such institutions, require annual reports, establish examinations and confer certificates, diplomas and degrees. But, in addition, the board by its power to fix the standard of examination for all degrees granted by the State, controls all the schools, since under this power it prescribes a certain preparatory as well as college course for the degree. In this way a high and uniform requirement is kept in all the secondary schools of the State. The executive work is conducted by a Commissioner of Education chosen by the board. His powers in the main are like those of other State superintendents. Numerous other Commonwealths have recently followed the New York plan and have given extended powers to the central officials so that the tendency toward central State control is a firmly fixed and successful policy in all our school systems.

**The Central Authority.**—The question as to the form of the central authority has been answered differently in different commonwealths. Most of them have established a department of public instruction under the control of a single official, the superintendent. Others have given the power to a board. At first glance the difference seems slight but a serious question of principle is involved. A single-headed authority, the superintendent, possesses the advantages which arise from any centering of authority, at a definite point, viz., quickness and efficiency of action, greater willingness to accept new ideas and to keep abreast of the times, and definite-

<sup>1</sup> Massachusetts is now considering the entire support of the public schools by the State treasury.

ness of responsibility and power. In favor of a board holding office for a long time, a greater freedom from political interference and from partiality is urged, also greater steadiness and conservatism and a broader point of view. It will be apparent that where the fear of political interference is predominant, the board plan should be preferred, while in other States the greater danger might arise from stagnation and inactivity; if so, power should be vested in a superintendent. In estimating the relative desirability of the two plans it should be remembered that a steady increase in the powers of the central State officers is taking place, with a more insistent demand for efficient action and control over the local authorities. Where conditions permit, we should therefore give preference to a system in which the single official head will be given more power while the board will be made advisory. Some one head must be supreme in school administration as in any other business enterprise of large proportions.

**The Illinois Superintendent.**—In Illinois a State Superintendent of Public Instruction is elected by the people for four years. His powers and duties are to keep general records of reports of local school officers and other documents relating to the school system, supervise all the common and public schools of the State; advise the county superintendents as to conduct of schools, construction of schoolhouses and methods of securing competent teachers; report annually to the Governor, make general rules and regulations for the execution of the school laws, give legal advice to school officers, hear and determine controversies arising under the school laws of the State when appealed from a county superintendent, grant teachers' certificates, visit such charitable institutions of the State as are educational in character, prescribe forms for reports, require reports from county superintendents and local boards under penalty of forfeiture of the State appropriation to schools in such districts and require reports from heads of public educational institutions within the State.

**The Massachusetts Board.**—In Massachusetts a Board of Education consisting of the Governor, Lieutenant Governor and eight other persons appointed by the Governor by and with the advice and consent of the Council for eight years, exercises the general control of the Commonwealth over its public schools. The place of a superintendent is taken by the Secretary of the Board, who is paid, the members of the board being unpaid. The board, or under its direction, the Secretary, requires reports from local boards, preserves records, makes a detailed report on condition of the schools, suggests improvements to the legislature, visits as often as possible the different parts of the commonwealth for the purpose of arousing and guiding public sentiment in relation to education, appoints agents to visit the schools in towns and cities, manages the State normal schools, holds Summer schools for teachers, directs examinations for teachers' certificates, manages the school fund of

the State and distributes the State appropriation to various towns for school purposes.

**Local Authorities.**—Each county has its own superintendent of schools who watches over the local district boards and reports to the State authority on their condition. In some States he also issues local teaching certificates and holds an annual teachers' institute for the purpose of stimulating and inspiring the instructing staff. The county is divided into school districts with an elected local board in each district; these boards choose the teachers, manage the school property and generally administer educational affairs; they have also the power of taxation for school purposes, and when necessary they may sell bonds to build new school-houses, etc. The entire control over higher education including colleges, universities and all bodies which grant degrees, is exercised by the central State authorities, either through a State board or a special Council. These latter determine when an educational institution shall have the degree-granting power, and recommend or oppose the granting of charters of incorporation to new institutions by the Secretary of State.

**New Problems.**—The States are now wrestling with two new problems of unusual importance and interest:

How to make the Universities and Colleges of greater public service and usefulness.

How to offer some vocational training in the elementary and high schools, in order to fit them more closely to the needs of the people.

The work of making our Universities more serviceable is one that deserves the greatest care and attention of the State. A University represents an investment of 10 to 50 millions or even more, and requires for its ordinary expenses and additions, from one-half to three millions yearly. How can these funds be made most productive to the community? In the past our higher institutions have done a great work in offering the best scientific and cultural education to those few who could afford to take the complete prescribed groups of courses. They have aimed chiefly to equip the leaders of thought and action. In this field they have rendered an invaluable service. The question now arises—can they not also widen their sphere of usefulness to include more of that vast multitude which we call "the people" and which is abundantly more able to furnish leaders than are the leisure classes? Another newer question presses still more insistently—ought the University to fix its attention solely upon the production of leaders? Can it not offer some of its facilities to those of the masses who are able to profit by them? Can it not even adapt its courses, relax some of its rigid groups of subjects and rearrange its methods so as to bring to all who can grasp and use them, some of those immense stores of inherited and acquired knowledge which would be of inestimable value to the plain common man who has never dreamed

of being a leader? We have already seen how high the scientific researches and attainments of the University can reach—we have still to find how broad can be its public usefulness.

**University Extension.**—Because of the strong popular movement in the Western States the University question has received more attention there, and in Wisconsin particularly the widest development of the new idea has occurred. Here the University as a State institution is supported mainly by public funds and aims to meet the broadest public needs. Certain features of its work have been noticeably successful.<sup>1</sup>

1. An Extension Department reaches the homes, the farms, the shops and factories of the people. Extension classes with lecturers from the University staff, correspondence courses, demonstrations and conferences, have opened up countless new opportunities for practical study and the work of "sending the University to the people" has been carried on with such vigor and success that all classes feel a direct interest. President Van Hise has pointed out that scientific knowledge has grown far more rapidly than the means of spreading it; the people are being left behind. We have accumulated a great store of information, of practical and scientific principles and other useful knowledge, but it is in the keeping of scientists and experts and has not been made available to the masses of the people. The Wisconsin idea is to open up this fund of helpful knowledge to the immediate use of the community. In the correspondence division there are over five thousand students with a hundred members of the faculty taking part in instruction. Fifty-seven local classes have been organized, and are visited by the professors from time to time. The Extension department has sought to gather in a number of other activities which could be helped by a close union with the University. Among these are:

The Municipal Reference Bureau, which answers questions on city and village problems,

The Anti-Tuberculosis Campaign with conferences, exhibits, etc.

The Lecture Bureau, which has three organization extension centers in Milwaukee, Oshkosh, and Lacrosse.

2. The noteworthy farming work of the University. Nowhere has there been such a careful and successful study of the agricultural needs of the State and such a remarkable fitting of new courses to these needs. The lumber and farming interests of Wisconsin have been foremost among her resources. The University Agricultural Department looking decades ahead, has seen that no modern, growing commonwealth can long depend upon timber as its chief or even as a leading industry. Accordingly the central feature of

<sup>1</sup> It should be clearly understood that in choosing principally the University of Wisconsin and in it principally the extension courses for discussion at this point, it is intended not to criticise nor ignore other courses nor other institutions, but rather to show by a single example what can be and is being done to increase the dividend paid to the people by the University investment.



... these practical sides of the subject only  
time of the year when the largest numbers ca  
tracts of land formerly unused, are now devoted t  
effect a new industry has been created which ad  
prosperity of the State. In other branches of  
number of new crops have been introduced both  
researches of the Faculty and by the practical  
subject in the class room; new methods of cu  
marketing have been worked up, the corresponde  
been supplemented by frequent tours by member  
all sections of the State are covered and the wo  
stimulating and educating the agricultural intere  
munity is so systematically and thoroughly done th  
farmer looks as naturally and habitually to the  
scientific guidance as does a steel mill to its testi  
Similar efforts are being made to open up the Unive  
to the commercial and industrial interests of the S  
spondence division offers a large number of busines  
in the general College studies such as literature, h  
events, the physical sciences, etc., the student is  
correspondence work and local classes under Unive

In short what the University possesses has been  
to all who can use it. In line with this same tend  
tuition fee now charged to residents of the State in  
State institutions, which makes it easy for those who  
time to pursue a course of study in residence. The  
led many municipalities in all sections to provide  
which the needs of the larger number of students  
served, both by lower rates of tuition and by new co  
practical benefit.

both University and State administration, it has increased the practical knowledge and breadth of vision of the teacher and enabled the public administration to attack and successfully solve problems that would otherwise have defied solution. The gain has been mutual, but the State has profited more. The work of the experts, both in law making and administration has been constructive. Whether it be the framing of a just tax measure, the regulation of the services of public utilities, or the drafting of a safety act, the aim of the expert is always to secure a practical, workable plan; he has no desire to punish anyone, no political vengeance to satisfy; his concern is to find and use the experience of other legislatures and adapt it, with all the skill at his command, to local conditions. Accordingly the popular confidence in, and public use of scientific help are growing in those commonwealths where it has been tried. In Germany for several decades this plan has been followed with such success that it is now an established feature of both the imperial and State governments.

**University Funds.**—In order to carry on an extensive plan of popular education, an institution must be backed by ample resources. All the Western colleges have been fortunate in having a part of the public land fund reserved for their use, and, as a part of the State government each receives a goodly appropriation from the legislature. Several have gone even further and have had set aside for them by the State constitution a certain portion of the State taxes. This has been done in Illinois with marked improvement of the University's usefulness. In Wisconsin the three-eighths mill tax which is permanently devoted to the University from the proceeds of general property taxation in the State by the Act of 1905, is not changed from session to session of the legislature, but is a permanent continuing appropriation. Seven-tenths of a mill are devoted to the common school maintenance and one-sixth to normal schools. Such a method places at the disposal of the University a large income which can be relied upon for its future plans. Of this system Dr. McCarthy in the *Wisconsin Idea*, says,—“This does not mean that the legislature cannot modify the plans of the University at any time, but it does mean established continuity. The wisdom of this is shown by the fact that some of the universities and educational institutions of the country have been in a turmoil of strife because under the so-called budget system their appropriations end every two years. They are helpless under the attacks of politicians and have no way to plan ahead. Freedom of speech in the university might have been seriously impaired recently had a minority of the legislature had the power to withhold appropriations for the university. It is evident that, if the legislature every two years passes upon the entire appropriation for an existing institution, a small minority of one house is able to threaten or block an institution so that it cannot extend to its fullest usefulness.”

propagated and abetted by the cause of the useless friction and conflicts between the various interests would be harmonious if properly guided. The University is a leader in the preparation and dissemination of scientific knowledge and more than any other single force, it has guided the public mind of the State into constructive channels rather than into destructive agitations. Yet even constructive progress means change, and change necessarily has aroused searching criticism and opposition from those who were opposed to all change of the present order of what nature.<sup>1</sup>

**Vocational Training.**—The more we use machines the more we create a sharp difference between skilled and unskilled work. This is true from the humblest manual laborer to the highest business executive. The machine intensifies a thousandfold the natural differences between men, in intelligence, education, and foresight, and opportunities. It not only makes a sharp distinction between employer and workman but it also intensifies the differences and even conflicts of interest between different classes of workmen and raises new questions of policy and division of labor among the laborers themselves. One of the most notable distinctions is between those who are expert in some one

<sup>1</sup> Says Dr. McCarthy on this point:

“During many years of legislative work the writer has found the legislature glad indeed to confer with the expert professor as to the merits of a bill, be it on a question of tuberculosis, the chemistry of gas or the regulation of a monopoly. Such professors are often reviled and censured as meddling in the life of the university—accused of throwing it into politics—but at the same time has the author heard a single comment involving the name of a professor who were engaged as well-paid experts by private corporations? The only case I was made when a man connected with the university law school was registered as an expert by a private corporation.”

who possess no such skill or training. This difference shows itself above all in the pay envelope. The unskilled laborer seldom receives more than \$1.50 or \$2.00 per day in spite of the most strenuous efforts of the union, because he competes with millions of his own kind, and the supply is unlimited. The Mergenthaler linotype operator in the printing trade receives from \$25 to \$35 weekly and even more, and the supply of skilled men is small and the demand growing. In still other industries machines reduce the men who operate them to the ranks of automatons, who can do one narrow, restricted piece of work and that only. As this operation can be learned readily and requires little intelligence the workman who performs it is easily replaceable and is necessarily paid as an unskilled laborer. So we find ordinary textile mill operatives tending machines for from \$6.00 to \$10.00 weekly while the highly skilled mechanics who make the machines are paid double or treble that rate. The men and girls who make yarns and thread are no better than day laborers; the weavers who make fabrics from the same yarn are skilled workmen with wages of \$20 per week. Nor is the situation otherwise in the higher rounds of work. Machinery has so extended the output that the successful producer now turns out a large amount of product with a small profit on each article—making up by his immense aggregate what he loses by his lower margin of gain per unit. This means that in the factory he must have superintendent, assistant managers, foremen and skilled workmen of a higher grade of intelligence to discover and introduce new economies, while the rest of his laborers are often of low grade in both training and pay. In his sales force he must market the greater output through a well-paid travelling staff, while in the executive offices he must have as his assistants men whose vision, judgment and native ability will cover the field of State, national and even international markets. This demand for high class men has come from large output and large output is the product of the machine.

All of these facts show that neither in the grimy shop nor in the brass railed office is there high reward for the unskilled "average man." The farm offers him no better chance, for it is on the farm that those remarkable new methods, the product of chemical laboratory, experiment station and scientific text-book, have made such revolutionary progress in the last two decades. The business of farming is now an applied science. Wherever we look we find the line between the skilled and the untrained being so sharply drawn in all vocations that the conclusion is clear—the community must use every means in its power to provide a vocational education for all who will take it. Such a work is needed because of the great numbers of people whose welfare is involved, while the sums expended are more than doubly returned to the community by the greater effectiveness and success of the businesses concerned. The movement for vocational schooling has advanced rapidly in the last few years and all the more progressive Commonwealths are

taking steps to provide the groundwork for a future system of industrial and agricultural training.

**The Open Road.**—Such training is the only means by which we can preserve “the open road” of opportunity for all classes, so that men and women can come up out of the lowest to the highest positions in industry, business and public life. It is only this policy of “the open road” that stands between us and Socialism. When it is no longer open to the masses of the people, when in their minds an insuperable barrier has been raised to block them from the opportunities of acquiring wealth, pleasure, culture and the pursuit of happiness, the belief in Socialism as a last desperate expedient waxes strong. Industrial education provides the way to gain that knowledge which is power, in a country like our own. It is in proportion to the opportunity for securing such education that the workman and the clerk and the salesgirl, are able to escape from the routine of drudgery, by making themselves more valuable to the enterprises in which they are employed and by opening up opportunities for advancement. In doing so they escape also the discontent which surrounds the monotony of routine work. From the viewpoint of business, such education is especially needed at this time. The more the force of labor concentrates its attention upon its grievances, and attempts by artificial means to force up wages and reduce hours, the less the productivity of our business enterprises. Industrial Education is the best solution yet proposed for the difficulties which are constantly arising between employer and workman.

**Industrial Education.**—The two States which have led in the movement to offer a thorough technical training along industrial lines are Massachusetts and Wisconsin. Massachusetts has provided that any local board may establish an industrial school with thorough technical courses, and may secure State aid amounting to one-half its expenses, by complying with the requirements of the State Board of Education. After an inquiry into the advantages of part time instruction to persons employed in factories and shops a system of part time courses has also been tried and found to reach a large number of people with satisfactory results. The State board has helped the movement by issuing a set of uniform rules as to the organization of industrial schools, the course of study and the methods of instruction which are necessary to obtain the State appropriation. There have also been started in various parts of the State a number of elementary trade schools which offer the rudiments of technical education. At Worcester a system of part time courses has recently been established by which apprentice boys in the machine trade spend four hours weekly in school, pursuing English, shop computations, drawing and shop practice. The classes are held during a part of the working day in time paid for by the employer. The Fitchburg High School plan is especially notable and is described later.

In Wisconsin also, rapid progress has been made and a complete plan of such education established. A Commission investigated this subject and reported in 1911 in favor of a continuation system,—“That as soon as school facilities can be provided for children between 14 and 16 years of age already in industry, they be compelled to go to school a specified time each week; that this time shall be expended as far as possible in industrial training; and that the hours of labor for such children shall not exceed eight hours per day for six days of each week, which time shall include the time spent by each student in vocational schools.”

This program is being carried out by a series of laws which offer to Wisconsin the most complete and thorough system of industrial education of any State in the Union. Some of the important features of these laws are:

(a) A local school board may establish a trade school and levy a tax of three-tenths of a mill per dollar for this purpose.

(b) The apprenticeship laws of the State are amended to require that every apprentice shall receive instruction of at least five hours weekly, which shall include English, Citizenship, Business Practice, Physiology and Hygiene, the use of Safety Devices, and other branches to be approved by the State Board of Industrial Education.

(c) Whenever a suitable evening school or continuation class of industrial courses has been established in a community for minors between the ages of 14 and 16, all children of that age who do not otherwise attend school, shall do so for not less than five hours weekly for six months in each year, and employers are required to allow a corresponding reduction in hours of work.

(d) The salaries of teachers in technical schools are placed upon a reasonable plane by the State requirement that the minimum be \$60 per month.

(e) An important departure has been made by establishing a separate organization of school authorities to control the industrial courses. This consists of a State Board of Industrial Education, and in every town, city or village of over 5,000 inhabitants there must be, while in places of less size there may be, a local board of Industrial Education, which shall manage the industrial, commercial, continuation and evening schools. This board is composed of the local Superintendent of Schools, two employers and two employés. The four latter are appointed by the local school board, and serve without pay. State aid is given to industrial schools only with the approval of the local school board, and appropriations by local authorities must also have their approval; whenever twenty-five persons qualified to attend an industrial, commercial or continuation school, file a petition with the local Board of Education, such Board must establish the facilities required by the Act. In New York State the Act of 1908 provided for industrial schools; later it was broadened to include agriculture, mechanic arts and

home-making. The State department of education has drafted outlines of courses in a wide range of vocational studies. There are already 35 industrial and trade schools with 145 teachers, 3,300 day pupils and 2,900 evening students. The State has also provided industrial training for teachers in three of the normal schools and teachers' courses for mechanics who wish to become instructors.

**The Richards Report.**—Dr. Charles R. Richards in his report to the National Bureau of Education on this subject, gives an admirable summary of the various types of industrial schools designed to meet the special needs of each class in the population, as follows:

"The institutions that at present occupy an important place in industrial training in this country are the intermediate industrial or preparatory trade schools, the trade school, the evening school, the part-time school, and the corporation or apprenticeship school. The economic factors involved in the conduct of these institutions are of two kinds: First, the expense of plant, operation, and cost of materials; and second, the matter of expense involved in attendance on the part of the student.

"The first-mentioned school is a comparatively new type of institution aiming to reach some of the large number of boys and girls that leave the elementary school at 14 years of age, and to supply a training that will give them a better equipment to enter industrial life at 16. Such schools take their students at an age when the question of wages is not so generally important as later on, and when many parents are willing to support their children at school for one or two years if convinced that practical benefits will follow. There are at present in Massachusetts and New York some 10 or 12 of these schools devoted to the woodworking, electrical, book-binding, printing, and machine trades.

"Taking into account the practical benefits afforded by such schools and the possibilities of attendance by a considerable number of boys and girls well fitted to become industrial wage-earners, and the not prohibitive cost for large communities, it is probable that such schools will become an important factor in industrial education in towns with large manufacturing interests and over 50,000 population, and that in time they will reach a considerable fraction of those boys and girls that now leave school at the end of the compulsory school period. From the character of training required and the close articulation with the elementary school, it is apparent that such schools are best fitted for administration by public-school authorities.

"The trade school, taking youths at 16 years of age or over, and furnishing a training to take the place in whole or in part of the apprenticeship system, is an institution which labors under the severest economic difficulties, whether considered from the side of maintenance or expense of attendance. Figures from schools now in operation indicate a grade of expense that obviously makes

such institutions prohibitive for any except large cities, representing exceptional specialization and concentration of industries; and even in such cities it is too early to prophesy that the results obtained will be permanently considered in proportion to the expense.

"Evening schools represent the first form of industrial education in this country, and they reach to-day by far the largest number of individuals under instruction in this field. As a means of supplementary instruction in mathematics, science, drawing, and technical subjects, they present a simple and effective method of industrial education, at least for young men above, say, 18 years of age. Taking the young worker after the wage hours of a day are closed, such schools and classes represent the most easily available form of industrial education for the great mass of young workingmen and the simplest types from the standpoint of organization. Practical evening classes which afford an opportunity to broaden the shop experience of the day stand in the same relation to the workers, but they offer a more severe problem in expense of administration.

"Evening continuation schools were for half a century the backbone of the German system of industrial education. To-day that country is coming to a realization that for students between 14 and 18 the evening is not the best time for instruction, and she is bringing the work of her continuation schools into the day period. It will naturally require a considerable time for this country to reach the same point and to bring about a general agreement among manufacturers to allow learners in their establishments to attend industrial improvement schools during working hours. The positive benefits that result when such a plan is followed, and the close correlation that is made between the work of the shop and that of the class room, have, however, been so strikingly shown that this system of industrial education deserves to be increasingly studied by both employers and schoolmen. When the time for attendance upon the school work is granted to apprentices or other learners by employers and the wages continued during this period, the economic problem for the boy is solved, and inasmuch as the public school is not called upon to supply the costly equipment for practical work, but only that instruction specifically fitted to the technical needs of the learners, the administration expense is reduced to a minimum."

**The Cincinnati and Fitchburg Plans.**—One of the central problems in industrial education is the question—when shall school sessions be held? This is in fact the main question, for most of the older boys and young men who wish to take the courses are prevented from doing so by their hours of employment. The public school authorities have tried to meet this difficulty in various ways. The best solution is the Cincinnati University and the Fitchburg High School plan. Dr. Herman Schneider of the University of Cincinnati School of Engineering, has developed for that institution a plan of co-operation with the manufacturers and business men



of the city, by which the engineering students devote a period to college training in the class room and then a similar period to shop work in the factories and mills of Cincinnati. Their shop work is supervised by members of the faculty and their class work is made to include a discussion of all the principles which they have applied in practice in the shops. In this way the University has been freed from the heavy expense of establishing its own mechanical shops while the students have the inestimable benefit of practical work, to complete and fill out their study of principles. This idea has been applied in successful form to the high school in Fitchburg, Massachusetts, by Professor W. B. Hunter. A number of the large manufacturers of the city agreed to co-operate with the high school and to allow students from the second, third and fourth years of the high school industrial department, to alternate weekly between the establishments and the school. In the first year of the course, the boys spend their entire time in the school, pursuing the usual English branches. In the second year the manufacturers take the boys in pairs, so that by alternating, one of the pair is always at work in the shop, and one in the school. Each Saturday morning the boy who has been at school that week goes to the shop in order to get hold of the job his mate is working on, and be ready to take it up Monday morning when the shop boy goes into school for a week. Shop work consists of instructions in all the operations necessary to the particular trade. Boys receive pay for the time they are at work in the shops at the following rates:

First shop year	10c an hour
Second shop year	11c an hour
Third shop year	12½c an hour

These rates are higher than were formerly paid to apprentices in the same shops, as the manufacturers of their own accord have raised the wage. Professor Hunter, from whose publications and reports this description is taken, has found that the system offers a strong inducement to boys to continue in school. They can earn some money, in fact more than they could by taking ordinary places in stores or offices. Again, many parents cannot afford to keep their children in school under the usual conditions. The Fitchburg plan allows the boys an opportunity to earn their education. A strong feature of the plan is the agreement entered into between the boy's parents and his employer. It is in substance an apprentice's agreement, and allows the boy a trial period of two months in which to satisfy himself that he really wants to learn a trade, and that he has selected the right one. If the boy is apprenticed the manufacturer then agrees that he shall remain as an apprentice for three years under the above-described arrangement. The subjects taught in the school are English, Mathematics, from elementary arithmetic, through Algebra and Geometry, but adapted closely in all cases to the practical needs of the shop, Freehand Drawing, Physics, Mechanism of Machines, Chemistry, Commerical Geography,

**First Aid to the Injured, Civics and Current Events.** In drawing up the study course, Professor Hunter has cast aside all tradition and attempted to build a curriculum which will meet the exact needs of a special class of boys. The interest of the students has been maintained throughout their course, and they are enthusiastic and industrious. The plan has been in existence for only five years, and it is therefore too early to judge of its final results, but it seems to offer a complete, practical solution of one important side of the question.

**The Massachusetts Report.**—As to our future policy in industrial schools an admirable program has been given in the "Conclusions Based On Experience" of the 75th Report of the Massachusetts Board of Education. Chief among these conclusions are:

1. If the regular local boards are to control the new vocational schools, there must be an advisory committee of persons directly engaged in industrial work, to give the benefit of their experience to the local board.

2. It is advisable for most communities, especially the smaller ones, to establish the new courses on a small scale, enlarging the facilities only after experience shows in which direction growth is natural. The best plan to start with is the evening course.

3. The all-day course for boys and girls may include many general and even so-called "culture" subjects, with advantage, but the evening course for mature persons should be composed of short subjects or sections of subjects of an immediately practical nature, such as blue-print reading for plumbers, stair-building for carpenters, sleeve-making for dress-makers; the work should be so arranged as to promote directly the wage-earning power; the mature worker who attends an evening course, as a rule, does not profit by the more general subjects.

4. A combination of schooling in class with factory or shop work is essential to the best results, because it offers a basis of practical experience for the teaching in class; it also reaches those who are to follow the vocation in question and accordingly fits their needs. The same principle applies with special force to farming instruction.

**Growth of the Vocational Idea.**—The whole movement for industrial training shows in an interesting way the many stages through which an idea struggles to ascendancy in American government. Originally a few enthusiasts who were ridiculed for their radicalism started the movement. For many years it was ignored; at times it was absorbed by the general manual training movement from which, however, it has now become distinct and separate. The labor unions at first paid little or no attention to the new idea and the large manufacturers regarded it as a plan involving too remote benefits to deserve support. It was not until Massachusetts, the pioneer in so many meritorious services of the State, had investigated and approved the principle, that business men began to recognize its wonderful possibilities. The idea has had to depend

chiefly upon the activities of local trade bodies and manufacturers' associations. Once it obtained headway, however, it has spread with surprising rapidity in all the manufacturing States. A few of the more progressive labor union leaders have come out strongly in favor of it, and in 1908 a Committee was appointed by the American Federation of Labor, under the chairmanship of John Mitchell, to investigate the subject. Its report marks an epoch in the attitude of the labor union and strongly favors the technical education idea.<sup>1</sup>

<sup>1</sup> "The inquiries of the committee seem to indicate that if the American workman is to maintain a high standard of efficiency, the boys and girls of the country must have an opportunity to acquire educated hands and brains, such as may enable them to earn a living in a self-selected vocation and acquire an intelligent understanding of the duties of good citizenship.

"No better investment can be made by taxpayers than to give every youth an opportunity to secure such an education. Such an opportunity is not now within the reach of the great majority of the children of the wage-workers. The present system is inadequate and unsatisfactory. Only a small fraction of the children who enter the lower grades continue through the grades until they complete the high school course. The reasons which seem to be the prime cause for withdrawal are first, a lack of interest on the part of the pupils; and secondly, on the part of the parents, and a dissatisfaction that the schools do not offer instruction of a more practical character. The pupils become tired of the work they have in hand and see nothing more inviting in the grades ahead. They are conscious of powers, passions, and tastes which the school does not recognize. They long to grasp things with their own hands and test the strength of materials and the magnitude of forces.

"Owing to past methods and influences, false views and absurd notions possess the minds of too many of our youths, which cause them to shun work at the trades and to seek the office or store as much more genteel and fitting. This silly notion has been shaken by the healthy influence of unions, and will be entirely eradicated if industrial training becomes a part of our school system, and in consequence of this system of training the youth will advance greatly in general intelligence, as well as in technical skill and in mental and moral worth, he will be a better citizen and a better man, and will be more valuable to society and to the country."

A corresponding investigation was also made by the National Association of Manufacturers which in 1910 received from a special committee on Industrial Education a comprehensive report on the subject, strongly favoring all the various types of schools which have been described above. The Committee advocated,—

(a) The establishment of evening schools for training in common educational branches, and for special skill and shop practice in the mechanical trades.

(b) Half day schooling each week for apprentices, the employer to pay for this time.

(c) A part time system, with a double set of apprentices on the Fitchburg basis.

The Committee points out that in all of these extension schools the fact that the young man was earning some wages would make it possible for many to extend their schooling who are now deprived of the opportunity. "All who are able to take the full course would, however, command higher wages at the end of the course."

Especially interesting and noteworthy is the Committee's report on Industrial Education for girls.

"The aim in the industrial education of girls must be a double aim, viz., preparation for the girl's occupation for immediate self-support and her preparation for home life in all its departments.

**Agricultural Education.**—Both State and National governments are showing great willingness to promote the farmer's interest in education and an extensive series of courses have already been established with success. The aims of this work are:

- (a) To make the farmer more successful in his business,
- (b) To render farm life more attractive and increase its social pleasures and usefulness,
- (c) To fit the young women of farming communities for the management of their homes and keep them in touch with the intellectual progress of their day.

We may see the popular need and demand for this instruction from the extent which it has reached. In the lower grades, agriculture is taught in all the common schools of 12 States, in only the country schools of 5 States, and is required for teachers' certificates in 16. State aid is already given to agricultural courses in high schools in 12 States. Higher courses are given in the agricultural colleges of 31 States and a majority of these also give "short courses" ranging from 2 to 12 weeks for adults. Fifty agricultural colleges in the various States are now receiving \$25,000 each yearly from Congress for the promotion of agricultural training and many of these also wisely offer courses of training for teachers. Good examples of the State's effort to strengthen its agricultural work are seen in the laws of South Dakota and North Carolina, which provide for special county farm schools. Whenever a county is willing to undertake such expense the State contributes \$2,500 yearly to the maintenance of the school. The courses provided include practical farm and housekeeping work and high school subjects. The buildings, courses and plant are under the management of a separate board of trustees.

**Newer Problems.**—Besides the two questions of greater University usefulness and vocational training which the States are

"These two aims must be kept in proper balance. Any system of industrial education for girls will be inadequate that does not provide for both aims:

"Your committee therefore conceives that the desirable consideration in regard to girls is the promotion of independent industrial schools so planned that the duplex needs may be secured, and that special effort should be made to advance the science and the skill in cooking and housekeeping.

"First. By the establishment of day industrial schools for girls whose main need is to prepare for industrial wage-earning pursuits. During this preparation for a trade however, considerable domestic training is a necessary part of the course.

"Second. Courses for girls who wish to take as a vocation complete and thorough training in any or all branches of domestic science, housekeeping, and management of the home in all its branches.

"Third. And possibly part-time schools for girls who are already engaged in wage-earning pursuits in the less skilled occupations.

"Fourth. Evening classes for women who are employed in the trades who wish to advance themselves; and also for trade workers who wish to prepare for teaching in industrial schools.

"Fifth. Evening classes for women and girls who wish to become better housekeepers."

now in a fair way to solve, there is a third problem upon which little or nothing has as yet been done,—the arrangement of existing means of education so as to secure better co-operation and “team-work.” This change is especially needed in the field of higher education where the waste of energy and resources is prodigal. The entire section East of the Mississippi is dotted with small institutions of higher learning, each with a handful of students, each struggling with an underpaid faculty and inferior facilities to keep its head above the waves of financial embarrassment and calling on its faithful alumni to make additional sacrifices in order that it may not fall behind its nearest competitor, and each finally in despair turning to its church board, or the Rockefeller foundation, or the State treasury, to make good the growing deficit. It would be difficult to overestimate the public service which these little institutions have performed in the past, but the growth of new subjects, the high cost of new equipment, and the increasing expense of education have placed them at such a serious disadvantage as to impair or destroy their usefulness. Is it now time to unite more closely these scattered resources? If many of these academies, colleges and “universities” could be closed up, or combined to form strong, vigorous, effective bodies, instead of the cause of education losing thereby, the students would be far better taught, the teachers better paid, the libraries, collections and equipment more complete and the general tone of all raised to a higher plane.

Finally a fourth task is now appearing before our educational authorities with attractive possibilities,—the work of devoting individual attention to the needs of each student. Heretofore we have used typical American factory methods of production on a large scale, whenever the number of students required it. All have been put through a “mill” and have come out hall-marked as from a die. It is still possible to tell at first acquaintance the recent graduates of some colleges by the stamp which the institutions have placed upon their habits of mind. The same is true of many public schools. Those of our large cities, forced to handle much greater numbers than can be trained by the limited facilities at their command, must resort to wholesale methods, treating each pupil as a number rather than a person.<sup>1</sup> Nor have we considered the future

<sup>1</sup> An investigation in a New York High School reveals some interesting facts on the need of greater individual attention for school children. This investigation by Dr. C. W. Crampton was based on a classification of high school boys according to their physical maturity. It showed a greater variation in physical advancement than in years. The boys were classified as:

First, those having arrived at puberty,—postpubescent;

Second, boys approaching maturity,—pubescent.

Third, boys not yet approaching maturity,—prepubescent.

They had all passed the work in the lower grades satisfactorily but in the high school only the most advanced did well. Few of the almost mature and none of the immature boys survived the strenuous high school work. From this Dr. Allen in his work on *Civics and Health* concludes that “physiological age, not calendar years or grammar school months, should determine the studies and

careers of those who are in school, to offer them guidance and information in the choice of their vocations. The parents have had to make this decision, without further knowledge than their familiarity with the child's superficial likes and dislikes. That the parents' choice has not been an enlightened one is shown by the large proportion of misfits in business and the professions and trades. The great salient fact in this situation is that the State is not helping its people to find and use their best opportunities. There is needed in both schools and colleges some means of studying more closely the abilities, temperament and natural bent of each student, of setting before him and his parents the opportunities, the work to be done and the rewards to be gained in the group of callings for which he seems best fitted. A beginning has been made in the Vocational Bureau of the Boston schools, originated and directed by Mr. Meyer Bloomfield, other cities are rapidly following the precedent set by Boston and sporadic efforts are put forth in the colleges by individual faculty members; but this is a field in which general co-operation and exchange of experience would be especially useful and the benefits of a State-aided plan would far outweigh its trifling expense. We need as a part of every school system a department of vocational advice, with a trained expert at the State capital, working under the Superintendent and directing the local departments. Such a system would increase many fold the usefulness and value of our public schools.

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#### QUESTIONS

1. At a public meeting called to discuss school taxes the following argument is advanced in an effort to reduce school expenses: (a) The State and local the companions of children after the tenth year. Physiological strength and vitality, not ability to spell or to remember dates, should be the basis of grading for play and study and companionship among younger children."

governments are overburdened with school charges,—“schooling” is a matter for those who can afford it,—let every one take as much as he can pay for in private institutions; (b) there are too many “fads” in education. Let every one be given the good old-fashioned “three r’s” without the many additional “trimmings” that have been loaded on to our school system,—if the old system were maintained, school expenses would be materially reduced. What would be your attitude toward each of these arguments and how would you express it?

2. Give some idea as to the extent of the public school system and its expenses.
3. In your State how much is paid by the State treasury and how much by the local districts?
4. Is the individual spending a longer or a shorter time in school than formerly and how does this affect the kind of studies taught and the educational work of the State as a whole?
5. Outline the general plan of subsidy system followed in most of the States.
6. Explain the New York system and its advantages.
7. Explain the usual organization of the county school system.
8. How are colleges and universities being made more useful to all classes of people?
9. Outline the Wisconsin idea and explain why it was adopted in that State.
10. Why have the Western universities been able to charge lower fees than those of the East?
11. How does a constitutional provision of a certain proportion of taxes for the University benefit the institution?
12. Resolved that the Wisconsin plan of university finances should be adopted in this State. Defend either side.
13. What is meant by vocational training and why has it become popular?
14. What is your view as to the advisability of vocational training in the public schools?
15. Explain the Massachusetts system of industrial training.
16. The Wisconsin system. Show the chief differences between the two systems.
17. Report on the system in your State.
18. Prepare a short essay on the subject of industrial training and include in it an outline of the various types of school required in a State system.
19. Outline the Fitchburg High School plan. What do you consider its advantages?
20. What are the views of manufacturers and labor unionists on industrial education?
21. Explain the purposes of State and national aid for agricultural education.
22. How do the States grant this aid?
23. What does the National Government do towards this end?
24. A meeting of representatives of the alumni of a number of small colleges in the central States is held to discuss the advisability of combination, on account of great financial deficits. What would be your stand on this question and why? Should the State support these colleges?
25. Explain the necessity for greater individual attention to school pupils and what can be done in this field.

## CHAPTER XXI

### THE STATE—Continued

#### HEALTH, CHARITIES AND CORRECTION

**Health and the State.**—The germ theory has greatly broadened and enlarged the usefulness of the State. So long as people believed that disease was a “humor” in the blood, to be cured by drugs, there was little to be done except to wait until a malady appeared and then cure it. But with the germ theory there has come a new idea and a new department of medical work—that of detecting and destroying the disease bacillus. With this change we have passed from the *remedial* to the *preventive* policy. But prevention is a gigantic task which far exceeds the resources of the individual; it means community action. We now expect our State governments to establish a healthful environment for all classes and to keep our streets, offices and schools as free from unsafe conditions as possible. This means that State activity in health affairs is multiplied one hundred fold. While the germ theory is a discovery of medical science, its effects upon government are most striking.

The progress of science now urges our States and cities to conduct thorough and exhaustive investigations of all forms of disease;

To maintain laboratories of hygiene;

To establish a systematic medical inspection of schools and other public institutions;

To enforce vaccination;

To inspect tenements, factories, sweatshops, etc.;

To disinfect dwellings;

To establish sanatoriums for consumptives, open air and recreation grounds for all classes;

And to maintain a reasonable standard of purity in foods and drugs and accomplish scores of other tasks, all directed towards the one great aim of providing a sanitary environment. Most of these new duties have fallen upon the local governments, and these bodies are supervised by a central State office. Another result of the germ theory has been the determination of the people to make public health a matter of general, not purely local, concern. The active passage and interchange of persons and goods between all parts of the commonwealth has made it imperative that some central authority be established to watch over the physical welfare of the entire State. Such a plan has been successfully adopted by most of the commonwealths.

**The State Board.**—The central body is fast becoming the strong-



local board exists;

Power to assist and encourage the exi

As the State Board usually meets o  
case of emergency, its continuous work  
tary who devotes all of his time to such  
of the board and its secretary is a corps  
inspectors and local district physicians.  
central laboratory in which its chem  
investigations, while the inspectors exan  
to the board any local conditions which tl

**New Problems of Health Administrati**  
questions confronting the State authoriti

- (a) The creation of pure water supplies
- (b) Purity of foods, beverages and drug
- (c) The campaign against tuberculosis;
- (d) The important administrative que

powers of the central authority?

(a) **The Water Supply.**—Every large to  
States either has already before it or is ab  
pure drinking water. The universal na  
raised this question to the front rank. Tl  
difficult one because of the rapid increase  
which require a municipal supply but ca  
plant. Again, the sources of pollution in t  
usually beyond the limits of the town itse  
its jurisdiction or control. This in itself is  
supervision and protection. The central  
trying to stop the widespread practice o  
streams which form the necessary

make its regulations and rely upon local boards for their enforcement.

These provisions give the Massachusetts board some means of protecting the water supplies of the State against the more open sources of impurity, but it is in its advisory capacity that the board exerts a more typical influence. No town is authorized to provide for a new water supply or sewerage system without first consulting the State Board of Health. Since in Massachusetts most of the plans for local sewerage and water supply require the authorization of the State legislature, the latter body would usually refuse to allow a change which did not meet with the approval of the State board.<sup>1</sup>

<sup>1</sup> The Massachusetts Act of 1886 and 1888 "To Protect the Purity of Inland Waters," etc., provides as follows:—

*An Act to Protect the Purity of Inland Waters, and to Require Consultation with the State Board of Health Regarding the Establishment of Systems of Water-supply, Drainage and Sewerage.*

Sec. 1. The state board of health shall have the general oversight and care of all inland waters, and shall be furnished with maps, plans and documents suitable for this purpose, and records of all its doings in relation thereto shall be kept. It may employ such engineers and clerks and other assistants as it may deem necessary; provided, that no contracts or other acts which involve the payment of money from the treasury of the Commonwealth shall be made or done without an appropriation expressly made therefor by the general court. It shall annually on or before the tenth day of January report to the general court its doings in the preceding year, and at the same time submit estimates of the sums required to meet the expenses of said board in relation to the care and oversight of inland waters for the ensuing year, and it shall also recommend legislation and suitable plans for such systems of main sewers as it may deem necessary for the preservation of the public health, and for the purification and prevention of the pollution of the ponds, streams and inland waters of the Commonwealth.

Sec. 2. Said board shall from time to time, as it may deem expedient, cause examinations of the said waters to be made for the purpose of ascertaining whether the same are adapted for use as sources of domestic water-supplies or are in a condition likely to impair the interests of the public or persons lawfully using the same, or imperil the public health. It shall recommend measures for prevention of the pollution of such waters, and for the removal of substances and causes of every kind which may be liable to cause pollution thereof, in order to protect and develop the rights and property of the commonwealth therein and to protect the public health. It shall have authority to conduct experiments to determine the best practicable methods of purification of drainage and sewage and disposal of the same. For the purposes aforesaid it may employ such expert assistance as may be necessary.

Sec. 3. It shall from time to time consult with and advise the authorities of cities and towns, or with corporations, firms or individuals, either already having or intending to introduce systems of water-supply, drainage or sewerage, as to the most appropriate source of disposing of their drainage or sewerage, having regard to the present and prospective needs and interest of other cities, towns, corporations, firms or individuals which may be affected thereby. It shall also from time to time consult with and advise persons or corporations engaged or intending to engage in any manufacturing or other business, drainage or sewage which may tend to cause the pollution of any inland waters, as to the best practicable method of preventing such pollution by the interception, disposal or purification of such drainage or sewage; provided, that no person shall be compelled to bear the expense of such consultation or advice, or of experiments made

In Pennsylvania, where conditions of highly developed manufactures and dense population also prevail, the State board of health has for years advocated the establishment of a force of "river wardens" under the direction of the board, to police the water supply of the entire State; but the recommendations of the Board have thus far been ignored by the legislature. This appears to be the only permanent, satisfactory solution of the problem since pollution becomes every year more extensive and dangerous.

(b) **Food Inspection.**—The use of fraudulent or harmful food adulterants and preservatives has become a question of deep popular interest as we saw in considering the National power to regulate commerce. Unfortunately the practice has not been confined to luxuries and delicacies. Since it is the poor especially who demand a cheap diet, adulteration and harmful preservatives are most prevalent in the ordinary necessities of the table, such as meat, salt, sugar, milk, butter, flour, meal, canned and preserved fruits and vegetables. Every manufactured article of common food and drink is now extensively adulterated. It will also be apparent that the evil falls heavily upon that class which is least able to protect itself. In view of such conditions, the National Government has adopted the law of 1906 already described and the States have begun to enact similar measures. The laws now in force are of two general kinds: First, those aimed to prevent fraud, though permitting the sale of *harmless* substitutes if plainly marked; and second, those intended to eliminate *injurious* adulteration and preservatives, of all kinds.

Under the first class of laws, for example, are those regulating the manufacture and sale of oleomargarine. This substance is not considered harmful; it is claimed to be cleaner than butter and is certainly much cheaper. The sale of oleomargarine as butter, having reached a point where it threatened to displace the genuine article, the various farmers' associations of the country began an active crusade against the new product. In response to this movement several States provided that oleomargarine must be sold as such. Dealers were required to be licensed, the packages to be plainly marked, and the use of coloring matter to imitate butter

for the purposes of this act. All such authorities, corporations, firms and individuals are hereby required to give notice to said board of their intentions in the premises, and to submit for its advice outlines of their proposed plans or schemes in relation to water-supply and disposal of drainage and sewage, and all petitions to the legislature for authority to introduce a system of water-supply, drainage or sewerage shall be accompanied by a copy of the recommendation and advice of the said board thereon. Said board shall bring to the notice of the attorney-general all instances which may come to its knowledge of omission to comply with existing laws, respecting the pollution of water-supplies and inland waters, and shall annually report to the legislature any specific cases not covered by the provisions of existing laws, which in its opinion call for further legislation.

Sec. 4. In this act the term "drainage" refers to rainfall, surface and subsoil water only, and "sewage" refers to domestic and manufacturing filth and refuse.

was in some cases prohibited. Here the objection is not to the sale of the article in question, but to the fraud perpetrated when this article is artificially colored and sold as butter.<sup>1</sup>

**Weights and Measures.**—The Departments of Weights and Measures of many of the States are now awakening to their possibilities and are issuing illustrated pamphlets for housewives which contain valuable material on methods of reducing the cost of living and show what service the State may offer in this new field. The pamphlets give practical suggestions as to the kinds of scales to be used; the methods of avoiding short weight; the great advantage of buying in bulk rather than in package; the ordinary methods used by dishonest dealers and manufacturers to conceal weights and the immediate bearing which the whole problem has upon the family's outlay for provisions. The pamphlets are prepared in a popular style and are replete with pointed hints.<sup>2</sup>

Many of the State laws also require that the presence of certain dangerous drugs in a food or beverage or in a medicine must be stated on the label. These laws so far as they affect products brought from other States are subject to the general food and

<sup>1</sup> The same applies to manufactured vinegars, etc., many of which are harmless preparations such as diluted acetic acid, but their sale as *vinegar* can no more be permitted than can other forms of fraud.

<sup>2</sup> The following example is taken from the Washington State publication:

#### DO YOU KNOW

That a Department of Weights and Measures for the State of Washington was created by the 1913 legislature?

That every city of the first class and every county in the State are to have a sealer of Weights and Measures?

That the county auditor is ex-officio sealer in his county?

That it is the duty of the sealer to protect the honest dealer and the general public in the matter of honest weights and measures?

That much depends upon you, Mr. or Mrs. Consumer, whether full weight and measure goes into the homes in Washington?

That a careful study of this booklet will make you a valuable assistant to the Department of Weights and Measures?

That every household should have an accurate scale and set of liquid measures that have been tested?

That your city or county sealer, or the State Department of Weights and Measures at Olympia, Wash., will test and certify your scales and measures free of charge for you?

That many cans and packages presumably containing a certain amount are far short of that amount?

That in buying some package goods, which since the passage of the pure food law have been gradually reduced in size, you are paying a high price for paper wrappings and tin?

That when dry commodities are sold in liquid capacity measures you are losing about 15 per cent?

That there are approximately 24,000,000 pounds of butter consumed in the State of Washington each year, and that a shortage of one ounce in each pound would mean a loss of approximately \$450,000.00 per year?

That in the City of Seattle the department seized and confiscated over 4,000 short measure milk bottles in the first two years of its existence, and that the shortage on these bottles alone more than equals the operating expense of the department?

drug laws of the Federal Government and may not conflict with the requirements of the latter. In *McDermott v. Wisconsin*, 228 U. S. 115; 1913, the State claimed that its regulations governing the wholesale and retail sale of goods and the labels which must be placed upon them were valid, even when they did not coincide with the Federal regulation. It was claimed that while Congress had the control of interstate trade and original packages, this control did not extend to the goods after the original package was broken, and the products displayed for sale at retail. The Supreme Court, however, upheld the Federal regulation and declared that the State rules for labelling were invalid when they conflicted with the former. The power of Congress to prevent the circulation in interstate trade of goods which were misbranded or injurious, was complete and absolute. The very purpose for which it was exerted would be defeated if a State could make other and different rules for the labelling of the packages. The purpose of Congress was to protect the consumer. Only the retail package and its label came under the consumer's eye. In order to make the Federal protection effective the method of labelling prescribed by Congress must be carried out, even on the retail package. This decision, while it establishes the supremacy of Federal regulation over articles brought in from other States, in no wise interferes with the proper authority of the State to control local manufacturers. Nor does it relax the standard of regulation since the Federal laws are far above the average standard of State legislation on this subject.

**Pure Food Laws.**—The second class of laws, those directed towards the suppression of harmful adulterants and preservatives, is more important. The extension of the vegetable and fruit canning industries has been in the main beneficial but has brought with it the wholesale use of certain conserving compounds which are considered harmful by medical authorities. The use of these drugs, notably salicylic and boric acid, is now forbidden by several of the commonwealths, as are also certain coloring extracts because of their injurious effects.

The executive force employed to administer these laws is organized under various authorities in different States. In Massachusetts the State Board of Health has been chosen, in Pennsylvania the Dairy and Food Commissioner of the Agricultural Department, in New York the Commissioner of Agriculture, in Illinois a special Food Department under its own Commissioner, with an additional Commission which fixes food standards. At the office of the central authority, in each case, there are located the necessary chemical laboratories, with a staff of expert analytical chemists, for the purpose of testing all products suspected of being manufactured or sold in violation of the law. In addition, a corps of inspectors is employed to traverse different sections of the State, particularly the manufacturing districts, and secure samples of *food for analysis*. These inspectors, acting as ordinary customers,

purchase from wholesalers or retailers the products towards which suspicion has been directed. The products are then carefully labelled and shipped to the State laboratories and tested, the results are notified to the inspectors and in case the law has been violated a criminal prosecution is commenced against the offending merchants and manufacturers.

The heads of the State food bureaus and of the national bureau have formed a league known as the Association of State and National Food and Dairy Departments. They hold an annual meeting which has become a clearing house for the exchange of experiences and improved methods. At this meeting the results of chemical analyses are talked over, new forms of adulteration are brought to notice, proposed changes in national and State laws are considered and the ever-present problem of cheap substitutes is viewed from the practical standpoint of the administrator.

Three important obstacles are encountered in the struggle for a firm administration of the law. The first is the difficulty of securing direct evidence against manufacturers. The purchase of a package of adulterated food stamped or marked with the name of the manufacturer is not conclusive legal proof that he is guilty of such adulteration. On the other hand, the dealers will not voluntarily testify that the manufacturer produces adulterated articles. It has therefore been found necessary to prosecute the dealer first, and after obtaining a conviction, proceed against the manufacturer. This is especially true also of bottled soft drinks which are extensively adulterated. A second difficulty is presented by the large profits gained by adulteration. In oleomargarine for example, the manufacturing interests have naturally aided in the defence of retail dealers when the latter were prosecuted for violation of the law, and have quite frequently paid the fines of dealers who were convicted. The prosecution of food frauds must be carried on carefully, with the utmost vigor and upon a large scale, in order to make violations of the law unprofitable.

Finally in certain manufacturing sections the support given the administration by the people themselves is only lukewarm. The ever-present demand for cheap food has already been mentioned; among the foreign-born population the lower standard of diet makes this a strong factor. In manufacturing districts like Massachusetts and Western Pennsylvania large numbers of the people prefer adulterated products on account of the price. In some sections it is even difficult to secure the conviction of offenders, in a jury trial, because of the popular demand for adulterated foods or food substitutes. None of these obstacles has proved insuperable, however, and both the standard of law making and the execution of the laws have steadily risen in the last few years. The prominence given to the pure food crusade has been enhanced by the general revival of interest in matters of both individual and public health. How widespread and genuinely national is the question of food

standards, may be seen from the fact that each new improvement in one State rapidly spreads to the others, that thirty-five States have already adopted the National Food and Drugs Act of 1906 in their legislation, that the State commissioners support each other with eagerness, and that each is constantly urged to renewed activity by pure food associations, local clubs and societies and even pure food journals, of which several have already sprung into existence. We are in the full flood tide of a national movement which promises to subside only after the entire food standards of the country have been permanently lifted to a higher level. The State might well extend its work in two different directions, first a further and more rigid suppression of dishonest practices, especially by the plainer marking of ingredients upon each package, and by a large increase in the inspecting force so that many provisions of the law which are now dormant might be strictly enforced; and second, the State might help the people by showing the amount and kind of nourishment contained in various classes of foods; it should conduct a general chemical study of food products or it should encourage such studies in University laboratories; above all it should publish and distribute a series of free pamphlets showing in a popular style the practical results of these studies. With every increase in the demand for cheap food and with every rise in food prices the importance of State action along this line becomes plainer.<sup>1</sup>

(c) **The Tuberculosis Campaign.**—It is in the fight against the chief cause of death that the State's usefulness shows the greatest possibilities. Consumption is curable and preventable. In both cure and prevention it is peculiarly subject to environment. The efforts of medical experts are accordingly aimed to cure those already afflicted by placing them in open air camps and sanatoria, and if this is impossible, then by inducing them to change their diet to simple flesh-producing foods and securing as much fresh air as they can; while to prevent the spread of the disease the specialists urge the separation of those who have it, wherever possible, and the most widespread, universal dissemination of knowledge as to ventilation, exercise, foods and cleanliness. This maps out the work of the State. By a combination with the public forestry reserves there have been established State camps where at a low charge patients may take the out-door cure for several months, while for those who are unable to leave their own localities special hospitals, dispensaries and educational measures are provided. Many State and city boards of health issue pamphlets of instruction free to the people and furnish to the newspapers material which is spread broadcast, so that a constant agitation among all classes is beginning to produce its results in the local mortality tables. But the greatest work remains to be done; emi-

<sup>1</sup> Some of the States regulate cold storage by requiring that food products must not be so kept for longer than a fixed period, and must be marked when offered for sale.

ment workers in the campaign are convinced that unless some specific medical cure is found for the malady, it would pay the State to offer free treatment in a large series of mountain and highland camps and to defray the cost of transportation to and from these camps for those who are unable to do so. By no other means can the ravages of this persistent and insidious disease be completely rooted out.

(d) **The Powers of the State Board.**—Two widely differing solutions of this general problem have been evolved; the first or early Massachusetts plan is to make the central State board chiefly a bureau of information for the education of the people at large and for the assistance and encouragement of the local boards; under this system the State board has no control over the local bodies and its only direct executive powers of importance lie in the suppression of epidemics, care of the water supply and the food laws. The reasons for this are so typical of the whole Massachusetts plan of administration as to deserve comment. The fundamental idea is to spread information and then rely upon the natural capacity of the people and of the local bodies to adopt the results of the investigations made by the central board. The latter issues popular leaflets, circulars and reports, and acts generally as a clearing house for information desired by officials or individuals. Public health requires a continuous campaign of advertisement and education in order to insure a strong, active and enlightened popular opinion. While this is true of all branches of administration in a democracy, it applies with special force to sanitation because of the rapid scientific advances which are being made in hygiene and medicine. Another cause has favored an informative, educational, rather than a strong executive authority; the Massachusetts board was the first in the United States, it was called forth by a series of violent epidemics of contagious disease which raged over the country in the late sixties of the last century. These virulent outbreaks caused such great loss of life that public attention was centered upon the problem and the State board of 1869 was established, largely as an emergency measure to cope with the situation. But when the emergency had passed it was not considered necessary to confer upon the central board any authority over the local officials and the State board to this day therefore possesses little control except in case of epidemic or similar crisis.

**The Indiana Plan.**—With the passage of time it has transpired that the original Massachusetts system does not meet the conditions of other States. It frequently occurs that the local township and city boards are, to put it mildly, not qualified for their work. In some cases where dangerous diseases were in question, a policy of concealment has been followed, out of a mistaken idea of local patriotism and the protection of local business interests. In others the measures prescribed by the State board to combat epidemics have not been followed or have been wilfully opposed and defeated, while often the returns of vital statistics which should be made by



the local to the central board, have been omitted for no apparent reason whatever. The local bodies have been able to defy the central authority in this way because of their complete legal independence and the lamentable weakness of the State board. To cope with this situation the State of Indiana, by its health laws of 1899 and succeeding years, explicitly provided that the local bodies, besides the usual functions mentioned in the law, shall "perform such other duties as may from time to time be required of them by the State Board of Health, pertaining to the health of the people." It is further provided that the local boards shall appoint executive health officers and, in order to establish firmly the authority of the central board of the State over these local officials, it is provided that, "The State Board of Health shall have power to remove at any time, any county, city or town health officer for intemperance, failure to collect vital statistics, obey rules and by-laws, keep records, make reports or answer letters of inquiry of said State board concerning the health of the people." Another section provides that, "The State Board of Health shall have supervision of the system of registration of births, deaths, and marriages." By these three important sections of the law the central board is placed in firm control of the sanitary administration of the entire State. Nor has this power been regarded as merely nominal; the board has exercised its full prerogatives and its activity has been welcomed by the local boards in many cases, because the latter have thereby been relieved of responsibility in matters which had become involved in political agitation or dispute. Indiana has also adopted the plan in vogue in some other States of holding an annual conference of all the local health officers for the exchange of ideas and for instruction in the latest advances in public hygiene. This conference lasts for two days, and is held in June for the officers from counties, cities and large towns and in December for those from smaller towns. Attendance is compulsory and the expenses of officers are paid by the localities. The Indiana plan of establishing a more adequate control by the central over the local authorities has thus far proved successful and seems well adapted to the needs of most of the States.

**How Shall the Central Authority be Organized?**—Much of the effectiveness of health administration has been lost because most of the States have adopted the board plan. In New York, instead of a board, there is a Department presided over by a single Commissioner of Health who must be a physician of at least ten years' actual practice, appointed by the Governor. Under his direction are the Secretary, Medical Expert, Registrar of Vital Statistics, Director of the Bureau of Pathology and Bacteriology, Director of Chemistry, Director of Cancer Laboratory, Consulting Engineer, Consulting Ophthalmologist, Director of Anti-Toxin Laboratory, etc. The powers of the Commissioner are to make inquiries and *investigations* concerning causes of disease, especially epidemics,

the effect of localities, employment and other conditions upon public health, health statistics, etc.; he may approve or modify ordinances of a local board of health so far as they affect the public health beyond the jurisdiction of such local board; he exercises exclusive jurisdiction over all lands acquired by the State for sanitary purposes, prescribes statistical methods for the various municipalities, examines into nuisances, exercises powers of the local board of health where a municipal corporation fails to establish such board, appoints clerical and other assistants and subpoenas witnesses where necessary.

This centralized plan is in accord with the latest experience in our municipal governments and is far more satisfactory than a collective body in all cases where rapidity of executive action is necessary. It has however been charged that the change was made in New York for political reasons, that a single Commissioner is apt to be more subservient politically than a Board and that the salary expenses are higher than under the board plan. In spite of these weighty objections, the New York system has worked satisfactorily,<sup>1</sup> and gives greater promise of efficiency.

**A New Public Health Policy.**—In this whole struggle of the State

<sup>1</sup> In order to show the extensive range of duties of even a conservatively organized central health authority, the following list of powers of the Massachusetts State Board of Health is appended; the asterisks denote important powers of a really executive character, the other powers being chiefly those of investigation, counsel and recommendation:—

To watch over the health of the citizens of the Commonwealth, make investigations and inquiries as to the causes of disease, especially epidemics, the effects of localities, employments and other conditions on the public health and relative to the sale of drugs, food and their adulterations; publish necessary information for diffusion among the people, advise the government as to proper location and sanitary conditions of public institutions, have oversight of inland waters, produce and distribute anti-toxin and vaccine lymph, examine annually all main outlets of sewers and drainage of cities and towns and the effect of sewage disposals; make an annual report with the necessary recommendations; enforce\* the laws relative to food and drug inspection and the inspection of liquors and beverages; publish the results of analyses of adulterated articles; investigate small-pox and other infectious diseases and consult thereon the local authorities; exercise co-ordinate powers with the Board of Health in every city and town; enforce\* the laws prohibiting the sale of impure ice; compel\* after a public hearing, the removal from the cities and towns of offensive trades, such as glue factories, bone-boiling and rendering establishments, etc.; establish regulations for the slaughter of swine;\* examine the sources of water supply of cities and towns; make\* regulations to prevent the pollution of the same; appoint agents and experts to enforce the law regarding pollution; consult with and advise cities and towns, etc., relative to the establishment of a system of water supply and of drainage and sewerage. (All cities and towns must submit plans to the State Board before making any change. Where legislation is required, the recommendation of the State Board is usually followed by the State Legislature.) It may also hold public hearings regarding pollution, and order\* its cessation; examine complaints as to contamination of tidal waters and flats and request the commissioners of fish and game to prohibit the taking of shell fish from such waters; approve\* the location of crematories and regulate the same, and where necessary, restrict\* the importation into the State of clothing manufactured under unhealthful conditions.

to offer its people a more healthful environment there is now emerging a choice of two policies, a parting of the ways. As Doctor Wm. H. Allen has shown in his *Civics and Health*, the public authorities may either take upon themselves the entire burden of creating the new environment of the people, which policy Dr. Allen calls, "doing things" or they may perform directly only what is necessary to establish a certain standard of health and then inspire the home, the church, the school, the civic society and the patriotic citizen in general, to do the rest,—this latter Dr. Allen calls, "getting things done." "Getting things done" is far better because it enlists the intelligence and the voluntary co-operation of all forces while the policy of doing everything directly by State agents often arouses opposition and does not stimulate that pre-eminently American quality of initiative,—it loses the benefit of team work and leaves latent and unused the potent force of self-help. As an example of the remarkable value of preventive public hygiene, Dr. Allen cites the results of the New York committee on physical welfare of school children. An investigation by physicians under the direction of this committee showed that 71% of the children examined had adenoids,—an easily removable deformity which invariably reflects itself in the backwardness, ill health, irritability or slothfulness of the child. The same investigation showed 48% of the children in rural schools to have defective vision. How shall these conditions be treated? Under the policy of "getting things done" by showing children and parents the facts and how to remedy them and, in a few instances, where necessary, by providing surgical assistance; under the policy of "doing things" by having school surgeons extract the adenoids and school opticians treat the eyes. The former is the educational plan.

The committee found further that physical defects in public school children occurred frequently in the families of the wealthy as well as in those of the poor; that many types of physical weakness were apparently in no way connected with malnutrition but came from poor ventilation, or poor light, or bad teeth; that the families of native born required attention as much as those of immigrants. From these and other data gathered the committee drew a number of conclusions bearing directly upon the work of the public health authorities. A few of these only may be cited:—

There is no evidence of physical deterioration of race stock,—on the contrary the vast majority of physical weaknesses noted were easily removed.

Home and street environment were more responsible than poor nutrition,—free meals in schools would not essentially improve conditions.

All classes of school children require attention, not only those of the poor.

Parents can be relied on to correct the greater number of defects, *if shown what steps to take.*

Where parents are unable to pay for necessary treatment, private philanthropy or State action is necessary.

Basing his proposals chiefly upon the conclusions of this committee, Dr. Allen has worked out a plan by which the State, health and school authorities can develop and inspire general co-operation. Such a program possesses so marked an advantage over a general movement for free meals, free eyeglasses, free medical care, free relief in school, that an outline of it is presented here. Its principal features are:—

A National bureau of health which shall gather and disseminate the facts among the communities of the United States and an active central State bureau of health in each commonwealth which will carry on the immediate work of educating, guiding, inspiring and, where necessary, compelling local co-operative effort.<sup>1</sup>

The State could work chiefly through the school with a clearing house of information to be maintained in each State, at the disposal of local authorities and those interested, a corps of State agents to make special inquiries and inspection of the school teaching of hygiene, a special instruction staff to carry on the propaganda among county superintendents, physicians, teachers, normal schools, etc.

A bureau of experts to pass on the plans of every new school building.

A county clearing house of information, a physician and nurse to

<sup>1</sup> "Five economic reasons are assigned for establishing a national department of health:

"1. To enable society to increase the percentage of exceptional men of each degree, many of whom are now lost through preventable accidents, and also to increase the total population.

"2. To lessen the burden of unproductive years by increasing the average age at death.

"3. To decrease the burden of death on the productive years by increasing the age at death.

"4. To lessen the cost of sickness. It is estimated that if illness in the United States could be reduced one-third, nearly \$500,000,000 would be saved annually.

"5. To decrease the amounts spent on criminality that can be traced to overcrowded, unwholesome, and unhygienic environment.

"In addition to the economic gain, the establishment of a national department of health would gradually but surely diminish much of the misery and suffering that cannot be measured by statistics. . . .

"If progress is to be real and lasting, it must provide whatever bulwarks it can against death, sickness, misery, and ignorance; and in an organization such as a national department of health, adequately equipped,—a vast preventive machine working ceaselessly,—an attempt at least would be made to stanch those prodigal wastes of an old yet wastrel world.

"Among the branches of the work proposed for the national bureau are the following: infant hygiene; health education in schools; sanitation; pure food; registration of physicians and surgeons; registration of drugs, druggists, and drug manufacturers; registration of institutions of public and private relief, correction, detention and residence; organic diseases; quarantine; immigration; labor conditions; disseminating health information; research libraries and equipment; statistical clearing house for information." Allen, *Civics and Health*, p. 135.

organize inspection and instruction in schools and to show officials and teachers how to interest parents in the physical welfare of school children.

In each township an examining physician, and a record of the physical history of each child from the time of entrance to the school.

In the city a special department of school hygiene with an officer giving his entire time to that work, a sub-committee on hygiene of the board of education; a local clearing house of information; a special examination of applicants for teachers' positions with reference to hygiene. A revision of the school curriculum to adapt it more closely to the needs of different physical classes of children; the supervision of indoor and outdoor playgrounds; a staff of examiners of children to ascertain, record and supervise the correction of defects; a staff of nurses to assist medical examiners in demonstrations of cleanliness and proper care of health.

Dr. Allen's program is here given somewhat fully because it is the most comprehensive, the sanest, and most feasible of the proposals made for the State care of health from a preventive standpoint. It is no exaggeration to say that this program, if carried out,—and it is slowly becoming the ideal of the more advanced States,—would remove the greater part of preventable diseases and defects and vastly simplify the whole public campaign for health. It has also the great merit of involving comparatively slight expenditure and little direct action by the State. It is in the main a stimulative, educational, and inspirational campaign, to which the school and public authorities would be readily adapted.

**Registered Professions.**—The State laws require that in order to practice certain professions which affect the public safety and health, a State permit or license must be obtained. This permit is only granted after the authorities have ascertained the fitness and skill of the applicant. At first the health and medical authorities granted these permits but with the licensing of new professions additional boards of examiners, one for each profession, have been established. So we have boards which examine and issue permits for the practice of medicine, nursing, dentistry, embalming, pharmacy, etc. Each of these has extended the training necessary to pass the examination until each now requires a high degree of technical proficiency which as a rule can only be acquired in a professional school. Other professions have rapidly followed the same tendency, notably those which involve fiduciary and confidential relations such as certified public accountants, lawyers, etc. In all these callings it is impossible for the client to know fully the reliability and skill of the professional man to whom his interests are intrusted. These interests are so important, even vital, that for the protection of the public the State must fix some minimum standard of honesty and efficiency which shall be satisfied by all the members

of the vocation. A further statement of recent legislation in this field is given in the Chapter on the Police Power.

#### STATE CHARITIES AND CORRECTION

**New Methods of Work.**—In examining the State's work in both health and schools, we saw that the recent growth of State power was due in each case to some new scientific idea, discovery or method. As this new idea gradually pervaded public opinion people began to see that its adoption required State action. This is peculiarly true of the field of charities and correction. The old idea of charity was to provide free soup for those who lined up at the door, or to gather them into the almshouse,—in short to relieve the *immediate wants* of the poor; the new thought is to help a family to regain its *earning power*. The old system produced a class of chronic dependents; the aim of the new is to remove the cause of dependence by cultivating self-support. But the modern method involves endless visiting, inspection and supervision. In our treatment of criminals and insane a like change has taken place; instead of the belief that all men are to be classed as either sane or demented, good or bad, we now recognize that no such sharp distinctions exist, but that it is a question of degree. Individual treatment may often overcome or remove the difficulty, but individual care means a reorganization of our system. We can no longer herd the insane and the criminal in pens like cattle as we formerly did, but we must apply modern methods and principles. The treatment of the criminal, the pauper and the insane has in short undergone a transforming evolution and in this growth the rule of the State government has necessarily become the vital influence. Again we have discovered that public charity and correction where left entirely to the local town or county have failed. Even the freedom until recently given to each reformatory, asylum, orphanage, hospital, almshouse and penitentiary to manage its own affairs, is no longer satisfactory; the State must set a standard of efficiency, as in the schools, and must see to it that the public institutions are kept well up to this standard. Meanwhile various private benevolent societies have begun to ask for subsidies from the State treasury, in order to cover their rapidly increasing deficits; this subsidy has been granted in many instances, but with it the State has asserted a right of inspection over the subsidized institutions. The State has become a regulator in this field as in so many others. Private hospitals, asylums, homes and other charities have, in many cases, secured substantial grants of funds, but have thereby come under the supervision of the commonwealth authority.

**The Central Authority.**—This authority is variously constituted in different States. Three general types have evolved, first, the *charities aid association*; second, the *supervisory State board of charities*; and third, the *highly centralized board of control*.

The Charities Aid Association is a private society of eminent and philanthropic citizens which has received from the State the right to visit, inspect and report on the conditions of penal, correctional and charitable institutions, but has no power of control whatsoever. The method pursued by such an association is to bring before the public a plain statement of what is being done and what should be done, relying on popular opinion to work out the necessary progress. In practice it has been found that many of the obstacles to progress arise from the want of knowledge of up-to-date methods on the part of local authorities rather than from any disinclination to keep up with the times. An annual State conference is therefore arranged as a general clearing house for information and exchange of views by the scattered officials all over the Commonwealth. The fundamental idea at the basis of this (New Jersey) system is, by the education of the individual wardens, superintendents and other officers to secure their voluntary adoption of better methods.

The second or "supervisory board" plan has arisen chiefly from State appropriations to private charities. There must be some authority which will watch over these institutions and keep the legislature informed of the use to which the public moneys have been put. This is one of the first duties of the board. Again when a new institution applies for State aid, its merits must be investigated. From these simple functions the scope of the board's activity has in many States been gradually enlarged. In the public institutions under its supervision the board may audit accounts and prescribe general rules governing the admission of inmates. It also acts as an advisory council recommending changes in methods of administration and in the laws. This system has been adopted in New York, Pennsylvania and a majority of other States.

The third plan is that of centralization. The board's functions are not limited to inspection, but include the actual management of the charitable institutions, insane asylums and penitentiaries of the commonwealth. It appoints and discharges superintendents and employes, makes regulations, changes methods, purchases supplies and in every practical sense administers the charitable and penal establishments of the State. It has sometimes received powers of visitation and inspection in State universities, normal schools, colleges of agriculture, etc., and represents therefore by far the most advanced type of centralization in this field. South Dakota, Wyoming, Washington, Arizona, Kansas, Rhode Island, Iowa, Wisconsin, Minnesota and other States have adopted this general plan with individual modifications. This new system has been the subject of keen criticism for more than a decade and its inherent merits and defects still form the central problem in the field of State charity.<sup>1</sup>

<sup>1</sup> Dr. Frederick H. Wines, former General Secretary of New Jersey State Charities Aid Association, in an annual report over a decade ago gave an *admirable summary* of the case against the board of control system.

The strongest argument on behalf of the central control is found in the experience of the Iowa board. At the time of its creation in 1898 the State institutions of Iowa were so disorganized that an investigating committee had been appointed and had reported, showing a condition bordering on chaos. To remedy this the board was established. The standard of efficiency has been raised in all institutions, regular visits are made at least twice each year, modern ideas have been introduced, purchases of supplies are made in quantity for all institutions and a material saving has been effected.

The underlying idea of the extreme centralized system is the control of all institutions from a single center. Arbitrary as this sounds, its real character must depend on the men who compose the central board; should they be so disposed, they may administer the office in such a way as to make it a means of stimulating and developing the initiative of the various officers under their control. This seems to have been the policy of the Iowa board. Central control does not necessarily imply arbitrary action destroying the spontaneity of the individual subordinate; it may mean the highest development of the spirit of co-operation with the added advantage of a means of enforcing immediate action where this is required.

The conclusion here must be the same as that reached regarding the central school authority of the State. Each style of board has its place in a certain set of conditions. The executive board of control represents the employment of specialists in a field where public opinion is not as yet well informed or active. The board of supervision and inspection, i. e., the "publicity" plan represents a simple effort to inform the people and the higher officials as to

Two strong objections are urged, first, political influence in the appointment of members of the board, superintendents of institutions and even wardens and subordinate employes; and second, the suppression of any individual initiative or originality on the part of these superintendents and wardens.

Dr. Wines maintains that the plan has not been successfully operated in any large State long enough to justify its adoption and that such experience as has been obtained, leads to the inference that the two weaknesses just mentioned form an inseparable feature of the system. Political influence creeps into the administration because of the great power of appointment wielded by the central board of control. Wisconsin and Kansas are cited as instances where even the subordinate positions in State correctional and charitable institutions were filled by incompetents who possessed outside influence. In Iowa the results of the control system are admitted to be most successful, but Dr. Wines contends that the experience in Iowa has been too short and the character of the men in control too exceptional to warrant any general conclusions favorable to the plan.

On the score of the discouragement of individual thought and originality in the various institutions, the same author claims that the superintendents of State institutions are so subordinated to the board of control and so divested of all discretionary power that they cease to be an important factor for progress in their fields of work. They contribute little or nothing to the general discussion of social problems at the National Conferences of Charities. In view of these facts and of some expert opinion against the board of control, Dr. Wines concludes in favor of a State supervisory board without controlling power. His opinion must be given much consideration, but the steady improvement in conditions under the central boards of control makes the question a doubtful one.



actual conditions in the public institutions, relying on public opinion to compel the adoption and maintenance of an efficient standard, once the facts are made clear. This latter method presupposes a vigorous and highly intelligent public sentiment, on which the supervisory board can depend for action.

The type of board or authority now needed is much influenced by the widespread attempts to raid the State treasuries for the benefit of thousands of small ineffective and badly managed private charities. "Charity" covers a multitude of sins including both waste and graft in flagrant form. It is a well-known practice for a group of physicians who are desirous of increasing their practice to found or reorganize a hospital for this purpose. Their friends aid in the worthy enterprise, the benevolent are invited to contribute, local pride, religious zeal and genuine public spirit are all exploited to the full limit in order to put and keep the "institution" on its legs, and then as a last resort the legislature is asked to cover the deficit. With the aid of political influence the attempt usually succeeds, and once on the list of State beneficiaries the hospital never lets go its grip nor ceases its demands for a larger subsidy. Is it well managed? Do its patients receive proper care? Could they be better and more reasonably treated at other better equipped institutions already in existence? What is the cost per patient per day? In brief, how much of the time, effort and money devoted to it is wasted and how much actually reaches the community in benefits? None of these questions is ever asked by the legislature. Nor is the hospital the only charitable spendthrift; the "home," the asylum, the reformatory, the refuge, the charitable school, the college—those which perform service and are meritorious charities and those which represent only faith and hope, and have not yet become charity,—all are included in the glad procession to the State treasury; even sectarian institutions which should not receive government support either because of their denominational control or the preference given to certain applicants for admission, are nevertheless "well heeled" politically and able to win their places on the favored list. A conservative estimate would place at 90 to 100 millions of dollars, the amount annually wasted or improperly granted by the States to charitable institutions. Prominent physicians have repeatedly urged that the inhabitants of a State would be better off if nine-tenths of the hospitals were closed and a part of their funds devoted to the few well-managed institutions. In one commonwealth the managers of certain State-aided institutions refused to make the reports required by law from all those which received public funds, yet they were able to secure a renewal of the appropriation. In this whole situation which is ripe for a constructive reorganization, we apparently need the strong arm of an administrative charities bureau which can administer the public institutions and cope with the more aggressive and wasteful privately managed concerns. Alongside this strong authority there

should also be the State Charities Association of benevolent public-spirited citizens, which should have only visitorial authority and whose chief function should be the work of informing and educating public sentiment.

**The New Jersey Plan.**—The New Jersey State Charities Aid Association organized in 1886 "To promote the improvement of the mental, moral and physical condition of the inmates of all charitable and penal institutions in the State of New Jersey," is a private society composed of a small number of public-spirited and progressive citizens who have been authorized under the Act of 1886, by the justices of the State Supreme Court, to visit and inspect most of the institutions in the State. The agents of the Association have no authority to order any changes in methods or to interfere in any way with the management of the institutions; yet they have brought about a complete transformation in the conditions of most of the jails, reformatories, asylums and almshouses throughout the Commonwealth, by making public reports of abuses and by pointing out the remedies needed.

**The New York Board.**—The supervisory board plan is now in operation in most of the States. In New York a board of twelve members appointed by the Governor for eight years is authorized to visit, inspect and maintain general supervision of all institutions, societies or associations which are of a charitable, eleemosynary, correctional or reformatory character which have by law been placed under the board's supervision.

*The board's powers are:*

To aid in securing the just, humane and economic administration of such institutions.

To advise the officers of such institutions in performance of their official duties, etc.

To approve or disapprove organization and incorporation of new institutions which shall be subject to the supervision of the board.

To establish rules for reception and retention of inmates of institutions subject to the board.

To approve building plans for institutions subject to the board.

To modify treatment of inmates.

To call attention of managers to defects in management.

To license dispensaries.

A fiscal supervisor is also authorized to maintain a central supervision over the finances of the more important public institutions. A State Charities Aid Association also exists and is authorized to visit and inspect asylums, prisons, almshouses and similar public institutions. It makes recommendations concerning the methods and management of such institutions.

In Pennsylvania there is a board of five members, appointed by the Governor with the consent of the Senate for five years. Through its general agent or personally by its members, it visits all

charitable and correctional institutions in the State at least once in each year; requires reports from various institutions in the State and from those of the several counties and townships; examines the finances of such institutions, their methods of instruction and management of their inmates, the official conduct of trustees and directors and other officers and employes, the conditions of the buildings, grounds and other property and all other matters pertaining to their usefulness and good management. The above provisions apply not only to State institutions, but also to those receiving State appropriations. The board, also through its general agent, visits and examines at least once in every two years, each city and county jail and almshouse for the similar purpose of inspection. Annual reports from jailers, wardens and executive officers must be made to the general agent of the Board. Institutions desiring State aid must give notice to the agent of the amount of the aid for which they propose to apply. The agent thereupon reports as to the advisability of such an appropriation. Refusal to give free access and necessary information or reports to the board is punishable by fine which may be collected by the general agent in the name of the board. The board may administer oaths in the course of its examinations. An annual report is made for the use of the legislature. The Pennsylvania Board has never been "aggressive" in the use of these powers. A vigorous use of them is needed.

**The Wisconsin Plan.**—In 1890 a central board of control of three members for the management and supervision of the State charity institutions was established. The various trustees which had administered these institutions were abolished; and the central board was given full authority. The other States which have adopted this plan have already been mentioned above. The latest example is that of Minnesota where in 1901 a law was passed which is typical of the most advanced form of control.

The Minnesota Board meets the superintendents and other executive officers of each institution at regular conferences and considers the management of such institution. It may make recommendations for the improvement of management and may enforce the same. The Board fixes salaries, determines the number of employes in each institution, formulates rules and regulations for the duties of employes, keeps a complete and uniform system of accounts with each institution, makes a biennial report, institutes investigations, summons witnesses and directs the various executive officers and managers in the letting of contracts and the purchase of supplies. The more important institutions under the control of the board are the hospitals, asylums for the insane, the institute for defectives, the State training school for boys and girls, the State reformatory, the State prison and the finances of the State university, the State normal schools, the State public schools and the schools for the deaf and blind. The buildings of the last named educational institutions are in the future also to be constructed un-

der the direction of the board, but the educational policy is not subject to its control.

**Problems of Public Charity.**—There are other difficult problems of State charity aside from the question of building an efficient organization to administer relief. But if such an administration could be established, to sift out and hold the best of the newer ideas and methods, to inspire the management of local institutions, to guide public opinion, to distribute the public funds economically among the deserving institutions of the commonwealth and to enforce a reasonable standard of service in each, the remaining tasks of State charity would be of minor importance. Among these are to be mentioned the care of such of the people as are rendered destitute by sudden and great economic changes like the invention of labor-saving machinery, which throw large numbers out of employment; or of natural catastrophes like the San Francisco earthquake and the floods in the Ohio valley; and the special care of fatherless children in their own homes, etc., etc. All of these special cases except the last may readily be cared for by means of relief already in existence, but on the care of orphan children the opinion of many sociological experts is undergoing a change. The so-called pension plan is now being attempted, to avoid the necessity of placing fatherless children in homes and other large institutions. It is granted only to mothers who have children under the age of 14 years. The amount ranges from \$9.00 to \$15.00 monthly for one child. In Pennsylvania it reaches \$26.00 for three children, and \$5.00 monthly for each additional child. The purpose of these acts is to preserve the family care of the children and to keep the home as a unit instead of distributing its members around among various charitable institutions. It has been estimated by sociologists that the State would aid fatherless children far better by using its funds to preserve the family, than by placing each child in a home or asylum where it would lack the parental care. Such laws have been passed in New Jersey, Wisconsin, Ohio, Minnesota, Michigan, Nebraska, New Hampshire, Oregon, Washington, Utah, S. Dakota, Idaho and Pennsylvania. In many of the States the administration of the Act takes place through a central State Board; in others through local boards appointed in each county.

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## QUESTIONS

1. Explain how the germ theory of disease has increased the work of the State government and give some examples.
2. How has it affected the division of power between the central and local authorities?
3. Explain the usual organization and general powers of the central health authority.
4. What is the form of central authority in your State?
5. Which do you consider the most important health problems in State government to-day?
6. Why is central supervision and regulation of local water supplies necessary?
7. Outline the Massachusetts system of supply protection.
8. How do the States regulate fraud in food production?
9. Explain the practical value of the work of an active department of weights and measures.
10. What does the department do in your State?
11. Outline the usual provisions of a pure food law and the organization which administers it.
12. Explain fully the practical obstacles encountered in the execution of these laws.
13. What can the State do to prevent and cure tuberculosis? Examples.
14. Contrast the educational and the executive types of a central State board of health and give illustrations.
15. A legislative committee is reorganizing the State health office in your commonwealth. Outline the plan of organization which you would favor and your reasons.
16. In a large city it is proposed that the standard of health shall be immediately raised by an active campaign in the city schools. At a public meeting called to consider the question it is proposed that free eyeglasses, free lunches, free medical and surgical treatment, free dental care, and other free facilities be furnished by the city government to the school children in the school building. Explain fully whether you would favor this proposal or not, with reasons and examples. If opposed, what policy would you advocate and why?
17. What are your impressions as to the wisdom of government compulsion in all matters of health?
18. As to the possibility of relying *wholly* upon the voluntary action of the individual, after attempts have been made to educate him on health questions?
19. Give your impressions as to the desirability of a national board of health, with reasons.
20. Outline and discuss the proposal for State and local health administration advanced by Dr. Allen.
21. How much of this plan already exists in your State?
22. Secure the views of a physician as to the wisdom and feasibility of the Allen plan.
23. Explain the general system followed by your State in controlling the medical and allied professions.

## REFERENCES—CHARITIES AND CORRECTION

- EDWARD T. DEVINE: *The Principles of Relief*.  
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## QUESTIONS

1. Explain how the present methods and purposes of charity differ from those of former times.
2. How and why has the treatment of criminals and insane changed?
3. Do the changes above noted call for greater or less State work, and why?
4. Prepare a report showing the organization and powers of your own State Board of Charities.
5. Contrast the New York and Iowa central authorities. Contrast the New York and New Jersey authorities.
6. Resolved that the "Central Board of Control" is the best plan of State administration for Public Charities. Defend either side.
7. What should be the work of the central State authority?
8. Resolved that all charitable institutions which appeal to the public for contributions should be under State supervision. Defend either side.
9. Resolved that the present legislative methods of appropriating State funds to charities should be abandoned. Defend either side.
10. Prepare a report showing what the State legislature should do as to funds for public charities.
11. Resolved that the State should make no appropriations whatever to charities under private control, or sectarian management. Defend either side.
12. Explain the Mother's Pension system.
13. Secure from some experienced social worker a practical opinion on the pension system.
14. Cite from the report of your State Board, its view of the distribution of State funds to privately managed charities.

## CHAPTER XXII

### THE STATE—Continued HIGHWAYS AND FINANCES

**Highways.**—Roads are the very blood-vessels of the body-politic. Poor roads mean poor circulation, which in turn means stagnation. Of all the means that promote the growth of a national spirit, few are so helpful as the active circulation of persons, ideas and merchandise between different sections of the country. The old notion that the roads of a locality were exclusively a matter of local concern, that it was for the people of each village or township to decide whether their highways should be roads or trails and ruts, is akin to the former idea that health and education were purely local matters. The idea of a State interest in and State control of roads comes after the population has grown to some density; this point has been reached earlier in the Atlantic States, notably in Connecticut, New Jersey, and Massachusetts, than elsewhere. Others are fast adopting the Eastern plan.

Certain main arteries are now generally conceded to be properly subject to exclusive State control, the more willingly conceded because the State thereby assumes the cost of construction and repairs. These form the so-called "State roads." But more recently a new movement has sprung up to relieve the local government of part of the burden of road expense. The idea of a subsidy from the State treasury, which was so successful in strengthening the local school system has been adopted here also. The Commonwealth contributes a certain fixed part of the cost of building new roads, the township or county raising the remainder by taxation or loans. In New Jersey a compromise has also been arranged between the State, the township and the abutting property holders, each paying a fixed proportion. The amounts paid by the central treasury vary in different Commonwealths, from one-third in New Jersey to three-fourths in Connecticut. This subsidy grant is an open recognition of the economic and social interest which the people of the State *as a whole* have in the maintenance of free communication between all its parts. The acceptance of the subsidy is left to the option of the local governments but it has been the experience of all the States that the townships have accepted the provisions of the law with such eagerness as to exhaust the State appropriation and to require the establishment of a "waiting list."

The keystone of the new system is a State Superintendent of Highways or a Board of Highway Commissioners. This officer or

board investigates the road materials and possibilities of each region, prepares road-plans, employs engineers and superintends the allotment of the subsidy to the townships. The office is a means, in fact, *the* means of keeping road-building and maintenance up to date.

As in the schools, so in road administration, only those localities whose highway plans conform to the standard fixed by the State commissioner, may receive assistance. This requirement uniformly means the construction of a macadam or other durable high-class road. The amounts appropriated by the States for this purpose have heretofore been small. In New Jersey 1,827 miles have been completed with State aid. The State subsidy, which is one-third of the total cost, was \$3,650,000. Every county in the Commonwealth has availed itself of the State aid law. In Connecticut alone nearly 1,000 miles of roadway have been built at a total cost of \$6,500,000 while 200 miles more are under construction.

It is a popular error to suppose that a good road once built costs little to repair. They not only cost far more to construct but also as much or more to maintain than the ordinary mud road; their true economy to the taxpayer arises entirely from their greater usefulness and speed. They are always open for heavy traffic. The lower cost of transport for farm products or, differently expressed, the greater productivity of the farm, must be reckoned in computing the cost and value of modern roads. Thus far only Pennsylvania has provided for a State subsidy for maintenance, one-tenth of the entire amount appropriated for roads being reserved for this purpose. The other States provide that the townships and counties shall keep all subsidized roads in repair. The best plan to enforce suitable maintenance by the localities is probably that described under the Connecticut plan.

Other States are following those already named in the adoption of a central control and subsidy plan and the system offers a valuable, practical means of hastening the new development of our agricultural regions. The objections urged against it are the increased burden of local taxation, the general preference of the farmers for the old system of "working out" road taxes which is interfered with by the new method, and the greater cost to the State treasury.

No serious administrative difficulty has thus far arisen. The States are gradually increasing the powers of the State Commissioner and are authorizing him to purchase expensive machinery, to be let out to the towns. An apparent combination to maintain high prices, between the contractors furnishing gravel, crushed stone and other road materials, may also force the State to construct its own stone-crushing outfits and other plants necessary for the supply of road materials. The cost of road-making has risen 20%<sup>7</sup> to 30%<sup>7</sup> since the States began their present policy. A first-class macadam road, 16 feet wide and 7 inches deep sometimes costs as high as



\$10,000 per mile. A State crushing plant would probably reduce this cost in the long run.

**The New Jersey Plan.**—The New Jersey system is one of the most highly developed of all the methods adopted. A State commissioner of public roads, appointed by the Governor, enforces the laws. Improved roads are constructed jointly either by the State and the counties or by the State and the townships. Under the county aid act the State pays one-third, the county the remainder; under the township aid law, the abutting property holders 10%, the State 23 $\frac{1}{3}$ %, and the township 66 $\frac{2}{3}$ %. In both cases the application of the owners of two-thirds of the lands abutting is necessary, as is also the consent of the board of freeholders in the county, or the township committee in the township, respectively. Privately owned turnpikes or toll-roads may be purchased upon the application of the owners of two-thirds of the abutting property. The State in this case pays a full third, the property holders ten per cent and the county the remainder. All new roads built under State subsidy acts are constructed under the direction of the State commissioner of roads, and are maintained and repaired by the counties and townships respectively.

**Connecticut.**—In Connecticut also a State commissioner of highways, appointed by the Governor, administers the law. Improved roads are constructed jointly by the State and the towns, the town paying one-third the cost and the State two-thirds. If the town is small, having a property assessment list of less than one million dollars, the State pays three-fourths. The State subsidy is divided, while it lasts, proportionately among the towns making application by a certain date each year. Not more than \$4,500 may be expended on one town in any one year under the Act. The work of construction is carried on jointly by the town selectmen and the State highway commissioner. Maintenance and repairs are town affairs, but if the town neglects them, the highway commissioner may perform necessary duties and charge to the town.

**Constitutional Regulation of Finances.**—All of the State constitutions have devoted much space to the limiting of the financial powers of the legislature. They set forth in much detail a long list of powers over which the legislatures shall exercise only the most restricted powers. The more important of these are:—

• Appropriations to charitable institutions; these must not be made for any denominational or sectarian purpose, and in some of the States they require a two-thirds vote of each House for their approval.

Each tax must be uniform; there must be no exemptions except the property actually used for religious and charitable purposes. Ordinary corporations may not have their property exempted from taxation, nor may corporation debts to the State be cancelled by any official. A surrender of the power to tax corporations is forbidden. But a few of the States allow special exemptions by local

communities for manufacturing corporations for a limited time in order to induce them to settle in such localities.

State debts are limited to certain purposes. An indebtedness which is contracted to cover a casual deficit in revenue must not exceed a certain amount fixed in the State constitution. Larger amounts may be contracted to suppress insurrection or repel invasion. Few of the States have any large debts; some have none whatever. Massachusetts has \$117,000,000; New York, \$108,000,000; Pennsylvania has none. The larger State obligations usually represent productive enterprises such as canals, roads, etc., which are in the best sense dividend paying, and are not burdens upon future generations. Most of the limits on State debts were imposed by the constitutions adopted since the Civil War. They have had a marked effect in reducing State obligations, until recent years when the demand for expenditures on public works has again increased materially the debt of most of the States.

Local debts; the debts of cities or communities, townships, school districts, etc., must not exceed a certain proportion of the value of their taxable property. This varies from 5% to 7%. But they may exceed this amount in borrowing funds for the purchase and operation of public utilities, such as gas, water works, etc. Some States even provide a further limit that any increase of debt beyond 2% of the value of taxable property must be approved by the voters at an election. All the States provide a certain time ranging from 25 to 30 years within which such local debts must be extinguished and require the localities at the time of contracting the debt to levy a tax providing for interest and principal of the loan.

The money borrowed by the State must be used for the purpose specified in the loan, and a sinking fund must be provided for each loan. The State's credit may not be given or pledged to any person or corporation, nor may the State subscribe to stock of a corporation.

**State Taxation.**—The new services which the State has undertaken mean much greater expense. This has induced many of the legislatures not to rely only upon the older forms of taxation but to seek new revenues, arranging these in such a way as to burden the masses of the people as little as possible. Among the older, more usual sources of State revenue are—

(a) The general property tax which covers both real and personal property and yields the largest single item of revenue in the State system. The personal property tax has also been tried in most of the commonwealths. In all it is a complete failure, leading to concealment of property or false returns, and to serious injustice. It has been found so easy to escape this form of taxation that the holders of bonds, stocks, securities, etc., seldom make any declaration of their ownership, and when asked to do so usually make a false return. It is the failure of taxes on personalty that has led to the adoption of the other forms of levy described below.

(b) Liquor licenses. These are very heavy in many of the States, and are productive of a goodly share of the revenue. In some instances they mount as high as \$1,500 for a retail license. As a result of this and of other high expenses in the business, most of the saloons are now in the hands of large brewing companies.

(c) Mercantile licenses. These yield but little revenue and are unpopular with the business community, because of the high cost of collection as compared with the amounts secured.

The newer forms of revenue which are now finding favor are:

(d) The inheritance tax, which has lately been adopted by a number of States; some have levied as high as fifteen per cent upon collateral inheritances, that is, property left to heirs who are not in the direct line of family descent; while still others, notably in Wisconsin and California, have adopted a progressive scale of rates, higher upon the larger inheritances.

(e) The corporation tax. This in many States yields such a large revenue as to make other heavy forms of taxation unnecessary. It is extremely popular because it supposedly falls upon capital, but it is ultimately paid in part at least by the consumers in the form of higher prices. A vigorous and successful attempt has been made in some States to force corporations to pay, not a special corporation tax, but their full share of the general property tax upon the real estate and personalty that they own.

(f) The Income Tax. Over twenty attempts have been made to enforce a State income tax. With the exception of Virginia and Wisconsin, however, these have all ended in failure, because of the small amount of revenue yielded, the serious administrative difficulties involved and the wholesale evasion and frauds which the levy has encouraged.<sup>1</sup> Until recently the State income tax has been regarded as a most unhappy experiment, but, because of the failure of the personal property tax and the general evasion which is practiced to escape its payment, the mind of the legislator is now turning once more toward a levy on incomes, which it is admitted, if it could be made practical, would be the most equitable of all the taxes. In Virginia \$100,000 annually is raised by this means, but the most notable, substantial success has been scored by Wisconsin. A valuable description of the State's experience was presented by Governor Francis E. McGovern at the Governors' Conference of 1912. It shows some remarkable conditions in the evasion of personal property levies in that State which are probably duplicated in many other commonwealths where the personal property tax has been tried. The Governor shows that an investigation of 473 estates by the Wisconsin Tax Commission, "revealed taxable securities, such as stocks, bonds, etc., worth \$2,266,105, which had been assessed the year before at only \$74,995,

<sup>1</sup> Prof. E. R. A. Seligman who has written an authoritative work on *The Income Tax*, favors a National rather than a State tax for the reasons given above.

or less than  $3\frac{1}{2}\%$  of their true value." "An investigation recently conducted in the city of Milwaukee showed that 200 persons had \$12,000,000 invested in assessable mortgages, stocks and bonds in other States and thus cut them entirely off the tax roll." The Governor also set forth startling inequalities in the assessment of personal property in different counties of the State, producing a vicious system of discrimination which worked largely against the poor in favor of the richer classes. It was this highly unjust, inequitable system of personal property levies which led to the adoption of the Wisconsin income tax. The basis of this law is of course *net* income. This applies to both individuals and corporations and allows a new corporation, which is getting on its feet and producing at first no dividends whatever, to escape the income levy until it has a real profit on which to pay. The exemptions are: \$800 for a single individual, \$1,200 for man and wife, and \$200 additional for each child under 18 years of age which is dependent upon the parents for support. The rate of taxation is graduated, being 1% for the first \$1,000 of taxable income and amounting to 6% for the highest incomes. The proceeds of the tax are distributed by the State as follows: 70% to the city or village or town; 20% to the county and 10% to the State. The funds, therefore, revert directly to the locality in which they were collected, and are used for schools, roads, health and local administration. The assessment of incomes is under the direction of the central State tax commission of three members appointed by the Governor. The commission appoints local assessors and has power to transfer them from one district to another or remove them from office. The assessors require a statement of income from taxpayers and in case of mistake or fraud, a re-assessment is made by the officials, from which an appeal may be taken to a county board appointed by the State tax commission and finally from the decision of this board to the commission itself. Corporations are assessed directly by the commission. It has been found that the tax is paid chiefly by persons who have hitherto escaped taxation very largely, although possessed of the bulk of personal property in the State. As a revenue producer also the tax is notably successful. In the first year, 1911, it raised \$3,500,000, of which \$1,100,000 was paid by individuals and \$2,390,000 by corporations.

The rising expenses of State government are due to three main causes. (a) The natural growth in the State's work and its service to the people; better roads, schools, health measures, better protection of property and the necessary regulations of corporate enterprise. All these increase the cost of government. To this increase no reasonable objection can be raised.

(b) The dishonest use of public funds is responsible for a large amount of the increased cost; recent revelations in New York and several other large commonwealths show the incredible extent to which this may go when aided by partisan connivance.

(c) The extravagance of the charity system which has already been briefly outlined and which also depends for its existence largely upon partisan motives.

The State's taxes and appropriations are made in a hit-or-miss fashion. As a rule the legislatures at the beginning of a session appropriate the funds necessary for the various administrative departments and the judicial and legislative expenses, and only at the end do they finally make the heavy appropriations, for so-called charitable purposes. These latter are so large as to exceed the revenues of the State. In two of the commonwealths the legislature regularly appropriates sums from twelve to twenty millions in excess of the State income and leaves to the Governor the work of paring them down.

For these reasons a number of the States,—Oregon, New York, Ohio, Illinois, North Dakota and Wisconsin, have attempted to establish a State budget along the lines proposed for the National Government by President Taft's Commission on Economy and Efficiency. The Oregon Act provides that all departments and institutions receiving State funds shall file every two years with the Secretary of State, an account showing the amount appropriated for the two-year period, the amount required for the next period and estimates of probable receipts or revenues for the coming two years. These accounts are to be summarized by the Secretary and placed at the disposal of the Governor and the legislature. The New York Act establishes a State Board of Estimate in which the Governor and other officials are members, together with the chairman of the chief legislative committees. This board examines all requests for appropriations from departments of the State government and from charitable and other institutions, and makes up a budget as a basis for the action of the legislature. The purpose of all such legislation is to offer some foundation for a modern system of accounting in State affairs, but it is only the first step in this direction. There is urgently needed to-day a complete plan of State, county, city and township accounts which will enable both the official and the voter to ascertain exactly what each service costs. No such plan exists outside of those cities which have active, privately supported municipal research bureaus.

If it were established in our State and local governments, it would be impossible to conceal the present waste, extravagance and fraud, and on the other hand it would become easily possible to direct public attention to the advantages of productive expenditures. A simple, clear method of stating the uses to which the public funds are devoted would enable the people of each commonwealth to grasp the relative importance of each group of expenses, and would immediately lead to sweeping changes in the State appropriations. When State funds are misused the cause is usually *some special interest* which has fastened itself upon the party *system*. Any proposed appropriation is judged by the standard—

how will it help the friends of the party? The grant of funds may be unjust, it may favor a powerful clique or group of interests, it may discriminate in an unfair manner, or it may be positively illegal, but will it help the party? This is the very opposite of the common welfare—it is the service of special groups, interests, and intrigues. The first step in the overthrow of this parasitic growth which has flourished for years in all the States is to show the people clearly where the public moneys go, what proportion of them is devoted to each general purpose and exactly what use is made of them by each of the offices and organizations to which they are granted. A typical means to this end is seen in the Wisconsin Board of Public Affairs composed of six State officials and three appointed members, which has as one of its important duties the establishment of a complete accounting system for every public body which receives State funds,—and by “public body” is meant not only public officer, commission or department, but also any institution, body or organization which receives, expends or handles the public moneys. The board requires detailed reports from every such body, showing the use of public funds; it has full authority to investigate such use, to establish efficiency records of employes, and to introduce improved business methods. It may investigate the feasibility of a central purchasing department for all public bodies, a central board of control for public educational institutions, it may test the efficiency of their teaching and educational methods, inquire into the cost of State printing, and other matters connected with the greater vigor and economy of the public bodies enjoying State appropriations. The Board employs a paid secretary and a number of accountants and investigators. It is also authorized to examine and report on other questions of public policy which are especially referred to it from time to time by the legislature; among these have been the duplication of work by public bodies and the possibility of reorganizing these bodies and redistributing their work along more effective lines, and the subject of co-operative credit and co-operative marketing. The board and its work give a striking illustration of the efforts, not always well-directed, but constantly more serious and vigorous, to modernize the State government and make it useful to all classes of the people. The Wisconsin board has been given more duties than it can possibly perform, but every one of them is of immediate value to the people of the State. The accounts and accounting methods of State and local bodies are now attracting public attention.

The Oregon Act of 1913 requires the insurance commissioner to conduct an annual examination of the accounts of the State offices, of institutions receiving State funds, and of the counties of the State; he also prescribes a uniform system of accounting for these bodies which they are required by law to observe. Other States are following in this practice, which bids fair to become a general

custom and to lift local accounts from their present obscurity and irresponsibility.

**Central Supervision of Local Administration.**—We have now considered most of the needs of the people which receive attention from the State. In all of them the new efforts of each commonwealth to make itself more useful and efficient have produced an increase in the *central* powers of the State somewhat at the expense of the *local* authorities. The financial aid or subsidy given by the commonwealth to the local authorities has been the means of effecting the change. This tendency toward centralization is still growing. Although each State began its history with English traditions of local self-government and many of the little local authorities still show the greatest jealousy of any central encroachment on their powers, the old days of complete local independence are past and we are now in a fair way to recognize what has long been accepted as a fact by foreign governments,—that a safe degree of supervision, guidance and even direct control by central officers is necessary in the modern State. The accounts of local authorities should be inspected and audited by central agents. The standard of health of the community may at times be threatened by forces beyond the control of the local board,—the State board must act. The progress of enlightenment and education of the children of a township cannot always wait upon the possible ignorance or failure of a township school board. The traffic through a local district cannot reasonably be blocked by the local official's ignorance of modern road building. In all of these matters something more than local interests are at stake. In all of them, too, it will usually be found that the people of the locality are willing and anxious to do their part towards local improvement, but not infrequently their elected officials in council, board or other office lack all qualifications for their duties and need guidance from skilled, technical experts or other central authorities. It is here that the control and supervision of the State official proves of greatest value in infusing local officers with a keener spirit of enthusiasm, a higher standard of effectiveness and providing them with the requisite technical and administrative knowledge to carry out the new standards of public work. The continental ideal of extreme centralization may never find root on American soil, but in many of our commonwealths we are already developing a plan which is better suited to our conditions, a system in which the duty of the central authority is to educate, inspire and guide and, when emergency requires, to enforce.

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### QUESTIONS

1. Prepare a summary report on the more important financial provisions of your State constitution, covering the following clauses:

- (a) Limits on taxation;
- (b) Limits on State debts for various purposes;
- (c) Limits on local debts for various purposes;
- (d) Limits on use of State funds and appropriations;
- (e) Exemptions from taxation;

2. Resolved that these constitutional limitations should be repealed. Defend either side.

3. Prepare a summary statement of the public debt of your State and show the purposes for which it has been contracted.

4. Show the growth of your State debt and the reasons.

5. Contrast the forms of tax levied by the National Government with those employed in your State.

6. Which of your State's taxes produce the most revenue? Show how much.

7. Prepare a brief report showing the form of the personal property tax in your State, if it exists, and secure some competent opinion as to the evasion of this tax.

8. Explain the defects of the income tax as usually applied.

9. Why have Virginia and Wisconsin again levied such a tax?

10. Prepare a brief report on the Wisconsin income tax and the system of administration which collects it. Explain its results, as contrasted with those of the personal property tax.

11. Resolved that the general income tax should be adopted in this State. Take either side.

12. Are inheritance taxes easy or difficult to collect and why?

13. Resolved that a progressive inheritance tax on all legacies above \$30,000 should be established in this State. Defend either side.

14. Explain the sources of revenue of the local authorities in your State.

15. Resolved that local administration in all branches should be free from interference of State officials. Take either side.

16. Why are State expenses growing so rapidly? Prepare a brief table showing recent increases in your State, and the purposes or causes of such increase.

17. Does your State legislature try to balance State income and expenditure? Show the plan adopted at its last session, or the difference between receipts and expenditures, if no plan was adopted.

18. Explain the purposes of a State budget.

19. Outline any system or systems now in use, and show their advantages.

20. Resolved that the budget plan should be adopted in this State. Take either side.

21. Explain the duties of the Wisconsin Board of Public Affairs, in State finances.



22. Prepare a brief summary of the Oregon Act governing the State audit of the expenses of local officers, and explain its purposes.
23. Resolved that such a plan should be adopted in this State. Take either side.
24. Why are corporation taxes so popular in the States? Could the entire State revenue be advantageously raised from this source? Reasons.
25. Resolved that the entire system of State taxation should be reorganized to bring it into better relations with national and local taxation. Defend either side.
26. Resolved that the building and repair of roads should be left entirely to the counties and townships of this State. Defend either side.
27. Does a good road cost more to construct than the old-fashioned type? Does it cost more to maintain? Reasons.
28. Resolved that the modern macadam high-cost roads are a better investment than the older type. Defend either side.
29. Explain the plan followed by New Jersey, Connecticut and other Eastern States and show what its advantages are over the older method.
30. Why are good roads not more popular among the farmers?
31. Prepare a report on the road system of your State, showing—
  - (a) The central and local administration.
  - (b) The State subsidy, if any, and the number of miles of old and improved road.
  - (c) The repair system and cost per mile.
  - (d) The cost of construction per mile.
  - (e) Any expressions of public opinion on the present system.

## CHAPTER XXIII

### CONSTITUTIONAL PROTECTIONS OF BUSINESS AND PERSONAL RIGHTS.—SAFEGUARDS OF INDIVIDUALS AND CORPORATIONS

**The Value of Constitutional Protections.**—In how far are life, liberty and property secure from the momentary whims of the party in power in State or Nation? How is the private citizen or the business man protected against an oppressive, tyrannical use of the machinery of government? May the State and National Governments regulate every business whatsoever in any way that they please, may they single out any industry or occupation and ruthlessly destroy it? May the executive interpret the laws oppressively against the rich, or the poor, or may the courts or the legislature discriminate between different persons, favoring some and persecuting others? What safeguards does the Constitution offer against such abuses of the regulative power? All these problems usually arise in one of the following practical forms:

1. The dangers of a sudden violent change in the Constitution.
2. How are corporations, as well as individuals, protected against government oppression?
3. Which businesses may be regulated and how?
4. How far may prices, rates or charges be fixed by law?
5. How far may the quality and kind of goods or services offered be regulated by law?
6. May government authorities discriminate by class laws?
7. Other limits of government regulation.

**1. Changes in the Constitution.**—In the method of amending the Constitution we see one of those ingeniously devised inventions of the Fathers which, they confidently believed, would preserve the government from popular excitement and turbulence. Article 5 provides that an amendment may be proposed either by Congress itself, through a two-thirds vote in both Houses, or else by a national convention which shall be called by Congress on the application of the legislatures of two-thirds of the States. Even after an amendment has been proposed in either of these ways, it does not take effect until it has been ratified either by the legislatures of three-fourths of the States or by special conventions in three-fourths of the States. This most difficult method of amendment, more involved and complex than that of any great nation of the world, was chosen with the idea of preventing changes, of raising the Constitution far above the ordinary law and making it some-

thing beyond and apart from the changing majority of the moment. And it has succeeded. Nowhere among civilized peoples is there a greater respect and reverence for a political document than is shown by Americans for the Great Law of 1787; as each decade passes, this admiration of the broad general outlines of our system grows.

But we must remember that the framers themselves, were they alive to-day, would consider some clauses more fundamental than others; some were bed-rock principles which should last as long as the Nation itself endured, while others were based on the needs and conditions then familiar,—conditions which might change and have indeed since changed. Among the permanent features were the republican form or representative system, the elected executive and the Federal Union of States. Among the less vital matters of detail were the exact method of choosing the legislature and the executive, the number of members of the Congress and the exact distribution of powers between the Nation and the States.

Our reverence for the Constitution is centered on its permanent principles,—while upon the wisdom of retaining the other, more detailed parts, our views must change according to the conditions of each epoch. Certain it is that many of these latter, less vital clauses have not worked out in the way intended, so that we have had either to change the wording of the document or to give its words a new meaning or, by means of party organization, to build up a machinery entirely outside of the Constitution which in many ways defeats or hinders its spirit. For this second less permanent group of provisions, we need a method of amendment which will insure reasonable progress. Does the present method answer this need?

Unquestionably we must admit that it does not. It has prevented nearly all progress in the Constitution except in times of great crises and popular excitement; the changes which have been made at such times, notably the 14th and 15th Amendments, have been neither wise nor helpful; for they have accomplished their purpose most imperfectly and have brought on other consequences that were neither foreseen nor desired. Why do we need an amending method that will render changes easier? Why not establish as perfect a constitution as possible and keep it without change? A political constitution is a continuing *growth* and not an *invention*. The Fathers in 1787 really expressed in the Constitution the views and ideas that had grown up in the previous 500 years of development in England and in this country.<sup>1</sup>

<sup>1</sup>George S. Fisher in his *Evolution of the Constitution of the United States* shows in an interesting way how each of the successful features of our Constitution is the result of experience and that the genius and inspiration of the framers consisted in their wonderful ability to grasp and use the valuable parts of the *British Constitution* and the Colonial Charters so that our Constitution is *founded upon the solid ground of experience*. While some would prefer to think

**The Unwritten Constitution.**—A young, strong, growing people cannot tie itself down to the proceedings of any convention, if those proceedings conflict with the vigorous growth of the national life. Our Constitution must make provision for such changes in its text and meaning as will correspond to the new developments and progressive steps in our existence as a people. As the body is more than raiment, so is our national life more than the political garb that we wear. We do not escape changes by refusing to change,—we only render them more violent when they come. We cannot prevent our fundamental law from following the real opinions, views and standards of the people. A Constitution which is not the real sentiment of the people soon fails of enforcement,—variations from it are winked at, the courts “interpret it broadly,” and there soon arises in place of it an “unwritten Constitution” composed of customs, habits, precedents, court decisions and party rules. This is exactly what has happened to those parts of our Constitution which do not fit the real conditions of our national life; they are shelved, or superseded, or supplemented by the unwritten law. In his admirable little booklet on the *Unwritten Constitution*, Judge Tiedeman says of the great document,—“But by making a popular idol of it, we are apt to lose the very benefits which its excellencies insure. It is the complete harmony of its principles with the political evolution of the nation, which justly challenges our admiration.” And again, speaking of Lincoln’s action in declaring martial law, which was apparently illegal under the written Constitution, he states,—“Whatever may be the proper deduction from the written Constitution, it is an established rule of the unwritten Constitution that the President, in the exercise of his war powers, may substitute martial law for civil law as far as the public exigencies may in his judgment require. For the time being, the written limitations upon his power are completely laid aside, and he appears in the rôle of an almost absolute dictator.” We have already seen other instances, such as the method of electing the President, in which it was clearly intended to remove the choice from the hands of the people, yet the formation of political parties soon completely reversed the written Constitution and established such a popular choice. In these ways the fixed rigidity of the fundamental law has led us to evade it in order to grow. For we must grow.

But the most striking example, which has never ceased to arouse wonder, is the Supreme Court’s repeal of part of the 14th Amendment in its decision on the Slaughterhouse Case, 16 Wallace, 36; 1873. The amendment having declared that citizenship in the United States was fundamental and belonged to every person born or naturalized in the country, and that State citizenship should be incidental to it, then provided further that no State should inter-  
that the document was a pure invention, it is far more important to see its  
*priceless value as a healthy natural growth.*

ferre with the rights of citizens of the United States, and gave to Congress power to protect and supervise these rights by appropriate laws. If we take this literally in its plain intent, it would enable Congress under this power to legislate on every subject which affects the rights of the United States citizens,—and what subject does not? In short it was feared that Congress in protecting the negroes could make laws on all affairs and thereby completely take over the sphere formerly held by the States. The latter would be at once reduced to the level of dependent districts, subject entirely to the control of the National Government. Needless to say such a sudden and revolutionary change would have destroyed all the real life of the State governments and would have introduced a premature and oppressive centralization of power long before the people were prepared for it. What should the Supreme Court do in this great crisis? Either it must follow the clear apparent reading of the Amendment with all the sweeping consequences that we have just seen, or it must devise a new and different interpretation of the clause, which would make United States citizenship supreme as was intended, but would protect the States from annihilation, thereby making of the 14th Amendment a progressive step forward in our continuous growth, rather than a freakish and destructive calamity. Of this crisis Tiedeman aptly says,—“Alarmed at the peril in which the people stood, and deeply impressed with the necessity of providing a remedy, the Supreme Court of the United States averted the evil consequences by keeping the operation of the amendment within the limits which they felt assured would have been imposed by the people, if their judgment had not been blinded with passion, and which in their cooler moments they would ratify.” That is, the Court declared national citizenship to be fundamental and State citizenship secondary, but denied to Congress the right to interfere with the powers of the States.<sup>1</sup>

From this hasty glance at the unwritten law the following facts are clear—(a) in spite of our fixed determination not to change the Constitution except by an extremely complex and difficult process, we have changed it in important particulars; (b) several of these modifications have been made by indirect means, through court “interpretations” and by party customs; (c) two of the amendments made in the formal way (the 14th and 15th) were so drastic, sweeping and ill considered that they have had to be changed by court decisions and by public sentiment, that is, by the unwritten law.

Judged then by either standard, as a means of preventing hasty changes in extraordinary moments of popular passion, or of securing the gradual adoption of reasonable, moderate changes in ordinary times, the present method of amendment has failed. We must even admit that the very thought on which it is based viz., a distrust of *the people, is now obsolete.*

<sup>1</sup> See Section 7 of this chapter.

**The Problem of Amendment.**—What then should be the method of amendment? If the present system is to give place to one better adapted to our needs, the new plan should have the following features:

1. It should distinguish between the Constitution and ordinary legislation, as does the present method; there must still be something fundamental about the Constitution as contrasted with a simple law.

2. This difference must not be so much a series of insurmountable obstacles piled up in front of the popular will to balk it and prevent all changes, as at present, but rather a requirement that will distinguish between a momentary whim and a more permanent desire or judgment; any change that is continuously desired by a majority, should be made.

3. In order to express the views of the more conservative of our people there might possibly be a further distinction between those fundamental, essential and permanent features of the document on the one hand and the less vital principles of detail on the other, as already described, with an easier method of amendment for the latter.

The following plan would embody these three principles:—

a. Amendments to be proposed by resolution passed by a two-thirds majority of each House of Congress.

b. Amendments to be ratified by a simple majority vote of the qualified voters of the country, to be held not less than one year nor more than two years after the favorable action of Congress, as above provided.

c. A second popular vote, a year later, in order to change any of those parts of the Constitution which are considered essential or vital.

Such a method of amendment would be founded upon our ripe experience and would make it possible to adopt any change which the strong steady pressure of public opinion insistently demanded, while at the same time protecting the vital fundamental parts of our system from the political whims of the moment.

**The First Ten Amendments.**—Each group of amendments has been adopted for a separate purpose:—the first 10 were to prevent the National Government from violating the liberty of the people or usurping the powers of the States. The 13th, 14th and 15th were intended to free the negro slaves, to protect them from persecution by the State governments and to prevent any State legislation which would deprive them of their votes for racial reasons. The first ten amendments were all inserted at one time and are usually called the “Bill of Rights” of the Constitution.<sup>1</sup> When in 1787 the

<sup>1</sup> When in the great English Revolution of 1688–’89 the British Parliament declared the throne vacant and called William of Orange to the vacancy, the Houses of Parliament passed a “Bill of Rights” which was signed by the new King, thereby binding him and his heirs to observe it. It contained a statement

Constitution was first proposed, most of the State constitutions already contained bills of rights. These were statements copied mainly from the great English Bill and setting forth certain civil and political rights as belonging to the people. The original Constitution in 1787 did not contain these statements and when it came before the State conventions for their approval it was thought wise to add such a list of fundamental rights. Congress at its first session took up this subject, and 189 amendments were suggested by the various State conventions and legislatures, most of these being repetitions of each other. Twelve were selected from this number and were passed by a two-thirds vote of Congress, and then sent to the State legislatures for their approval. Ten of the twelve were so ratified and were declared in force at the close of 1791.

Since they were intended solely to limit the Federal Government, *they do not apply to the State authorities.* The protection which they offer to all persons, both citizens and foreigners, covers the following points:—

Religious freedom.

Freedom of speech and of the press.

Protection of person and home against unwarrantable searches and seizures.

Safeguards of procedure, jury trial, etc., for persons accused of crime.

Safeguards of liberty and property in civil suits.

The rule of interpreting the Constitution. (Amendment ten.)

Many of these safeguards and protections are repeated in the 14th Amendment *which applies to the States only.* Accordingly if a person's property or liberty is violated he must appeal to the first ten Amendments for redress against the National Government, or to the 14th Amendment if the State has committed the violation. The courts make a sharp distinction between the first ten Amendments and the rest of the Constitution in this respect. They hold that notwithstanding the broad general language of the first ten Amendments these latter are to be applied as a limit to the Federal Government only. For example: the 5th declares that no persons shall be "deprived of life, liberty or property without due process of law." A literal interpretation would hold this to mean either by the States or the National Government, but the history of the amendments shows that only the National Government was intended, as we have seen. The owner of certain wharf property in the city of Baltimore brought suit against the city, *Barron v. Baltimore*, 7 Peters, 243; 1833, because of the damages done to his wharf by the city in diverting certain streams of water so that they deposited sand in front of the wharf. He held that this action was a taking of his property in defiance of the 5th Amendment. The

*of what the Crown could not do, just as our first ten amendments, drawn exactly 100 years later, contained a list of rights which the new American National Government could not violate.*

Supreme Court ruled that the amendment did not apply to the State governments but was intended solely as a limit upon the powers of Congress. A long line of later decisions has upheld this view and applied it to the other provisions of the first ten amendments.

**The 13th Amendment; Peonage Laws.**—The 13th Amendment prohibiting slavery or involuntary servitude has some practical importance even to-day. The amendment forbids slavery not only in the United States but in any place subject to their jurisdiction. One of its recent applications was the repeal of an agreement made by the American army with the Sultan of the Sulus in 1899, because the agreement expressly recognized all the domestic institutions of the Sulu Islands, among which were both polygamy and slavery.

Another instance was the ruling by the Supreme Court that a State could not pass a law punishing by penal servitude a debtor who obtained advances of food, provisions and money, under a promise to labor, and then refused to perform such labor. In the South the white farmer often employs colored hands giving them an advance payment either in money, food or farming implements and deducting the loan from their wages in small installments during the next year. It having become customary among some of the more shiftless class of Negroes to obtain the loan and then leave without paying it in full, the farmer was unable either to recover the money advanced or to compel the workman to do his agreed task, since it did not pay to sue the Negro debtors, who owned nothing. To remedy this several Southern States passed laws making it a criminal offence for a workman to enter into such a labor contract, and thereupon refuse either to do the labor or to pay back the money advanced; and providing that it should be prima facie evidence of an intent to defraud the farmer if the laborer left his employment without paying the loan. Punishment was by fine or imprisonment. In the leading case of *Bailey v. Alabama*, 219 U. S. 219; 1911, the question arose—Do such laws violate the 13th Amendment by creating involuntary servitude? Bailey was indicted under the State law for having broken a contract to work as a farm hand for the sum of \$12.00 per month. He obtained in advance \$15.00 for which he was to pay \$1.25 monthly from his wages. After remaining one month in the employ of the company, he left without giving any reason and failed to refund the \$15.00. The lower court convicted Bailey, instructing the jury that the breaking of Bailey's contract and his leaving employment created a presumption that the contract was entered into fraudulently. The jury found Bailey guilty. He, being sentenced to pay a fine of \$30.00 or 136 days in prison, appealed to the Supreme Court of the United States, claiming the law to be a violation of the amendment, and declaring that since a debtor was not a criminal unless criminal intent were plainly shown, he could not be sentenced to involuntary servitude. At the time of the suit there was some



agitation of public opinion, it being discovered that the treatment of prisoners was in many cases debasing and lowering to their moral tone and that prisoners were obliged to work in convict camps, were auctioned off to the highest bidders for their services and badly treated; in consequence of these facts much attention had been directed from all parts of the country to the whole problem of peonage. The Supreme Court decision probably reflects this opinion. The Court held that the law was a violation of the amendment because it visited a criminal punishment, that is, servitude, upon something which was not criminal; viz., debt. The full intent of the constitutional provision against servitude could be defeated with obvious facility, if through the guise of contracts under which advances had been made, debtors could be held to compulsory service. It is the compulsion of the service which is forbidden, for when that occurs, the condition of servitude is created, which would be no less involuntary, because of the original agreement to work out the indebtedness. Peonage is a condition of compulsory service based on the indebtedness of the peon to the master. It exists even where the debtor voluntarily contracts to be bound to the service of his creditor, and also where it is forced upon the debtor by some provision of the law. In short, a man may legally contract to render a service for a given time, but it is not legal nor constitutional under the 13th Amendment for him to be forced to labor if he should break his contract, nor is it constitutional to sentence a person to involuntary servitude immediately upon his breaking a labor contract, nor to claim as does the State law, that the simple failure to perform such a labor contract is in itself evidence of fraudulent intent, and therefore punishable with involuntary servitude. Bailey was accordingly freed from the imprisonment and forced labor. Similar peonage laws in other States have since been abandoned.

**The 14th and 15th Amendments.**—The original purpose of the 14th Amendment was to prevent the State legislatures of the South from passing hostile laws against the freed Negroes. Although the Negro slaves had been emancipated by the 13th Amendment their attitude towards the white population and that of the whites towards them was so hostile that constant rioting, bloodshed, and revolting race warfare followed. The Northern people, in control of the Federal Government, sided with the freedmen and decided to protect them by (1) granting them United States citizenship with all of its privileges and immunities, and (2) by forbidding the States from interfering with United States citizens' rights. But up to that time citizenship had been conferred only by State laws. The 14th Amendment changed this by declaring that all persons "born or naturalized" in the United States were citizens of the United States, and forbade the States to violate the rights of United States citizens. Since *practically all the former slaves had been born in the United States, the Amendment conferred citizenship upon them. It was later*

followed by the 15th Amendment which declared that the State must not deprive a citizen of the United States of the right to vote, *because of his color or race.*<sup>1</sup>

This clumsy method of protection had at least the effect of preventing persecution of the Negro by the State legislatures, but it failed completely in its purpose to establish the Negro race in economic independence in the South. The Negroes had been useful and had a definite place in the economic system. But when the race conflicts began after the Civil War, industrial co-operation between the races became almost impossible and the blacks rapidly became a heavy burden and danger to the communities in which they lived. The industries of the South were for a long time shattered by this convulsion, due both to the war and to the unreasonable and impossible legal conditions which the North had imposed. Like all other peoples who have experimented in government, we Americans often give way to the notion that anything can be done by law. Nowhere has this idea failed more disastrously than in the attempt to make useful citizens of former slaves solely by a *constitutional amendment*. The situation created by this unfortunate fanaticism is being slowly and painfully worked out by both races in the South. The Negro is coming to his own by the gradual spread of mechanical and technical training, which gives him a recognized place as a useful member of the community and above all a desire to acquire property by skilled work, and thereby attain a position of real independence. Grover Cleveland with his gift for epigram described the problem by saying—"Before we have a citizen we must first have a man." The citizenship of the Negro like that of any other group of our people is becoming a reality in proportion as he can learn to work and to make himself a helpful and needed factor in our civilization.

We must remember that the 14th Amendment aims to protect the Negro's *civil and political* rights. It is not intended to stamp him *socially* as the superior, the equal, or the inferior of the whites. This principle is clearly shown in *Plessy v. Ferguson*, 163 U. S. 537; 1896. Here the State of Louisiana had required that railway companies in the State should provide equal but separate accommodations for white and colored passengers by partitioning off two or more coaches on each train and requiring persons of each race to occupy the portions of the cars assigned to them. Plessy, a colored man, was ejected from the car assigned to white persons and arrested for violating the Act. He claimed that the law was invalid in that it deprived him of the equal protection of the law. The State courts having decided against him he appealed to the U. S. Supreme Court which in 1896 held the law constitutional, since it did not interfere with

<sup>1</sup> But the State may deprive a person of the right to vote for any other reason, such as illiteracy, crime, pauperism, insufficient age or insufficient residence within the State. Most of the States do so limit the suffrage and many of them restrict it to males. The only voting right therefore which the 15th Amendment grants is freedom from discrimination because of race.

the political or civil equality of the races, but was intended rather to preserve peace and good order. The law, said the Court, did not stamp the colored race with any badge of inferiority unless the race chose to put that construction upon it. Equal rights could not be secured to the negro by an enforced commingling of the two races. If the civil and political rights of both races were equal, one cannot be inferior to the other, civilly or politically. If one race be different from the other socially, the Constitution of the United States cannot put them upon the same plane. But the 14th Amendment is not confined to the race which it was intended to protect; its terms are so broad as to include all "citizens" and "persons" and in this way it has come to have an important bearing upon business and property rights as we shall now see.

**The Last Two Amendments.**—The 16th and 17th Amendments which authorize Congress to levy an income tax without apportioning it according to population, and provide for the popular election of Senators, have already been mentioned in the chapters on the Senate and Powers of Congress. Their adoption marks a new era because the conviction had been steadily growing that the Constitution could not be amended; it is the hope of many that further changes may be made now that the "ice is broken." Among those recently suggested are:

The direct election of the President,  
Women's Suffrage,  
Prohibition,

National control over insurance, manufacturing, and corporations.

We must remember, however, that the income tax amendment was agitated for 18 years while the direct election of Senators was debated in Congress at various times for over 80 years before it received approval. From our experience in these two cases it would seem that we are over-protected against constitutional changes in ordinary times.

**2. The Protection of Corporation Charters.**—The Constitution declares in Article I, Section 10, that "no State shall pass any law impairing the obligation of contracts." When a State government grants a charter of incorporation to a new company, the State in reality makes a contract or agreement with the incorporators, by which a new legal person, the corporation, is created and its powers are defined in the charter or agreement. The charter so granted is a contract in the sense of the Constitution, and cannot be revoked or changed or "impaired" by the State without the consent of the corporation. This principle was established in the Dartmouth College case which has been quoted in thousands of corporation decisions since it was handed down by Chief Justice Marshall in 1819. In many points it is the foundation of our corporation law. In 1769 King George III of England issued a charter of incorporation for Dartmouth College, in the colony of New Hampshire, the principal purpose being to encourage education in the colonies and to enable

philanthropic persons to donate funds to a permanent institution of moral teaching in the new world. After the Revolution and the adoption of the present National Constitution, the State legislature of New Hampshire fell into a political quarrel with the College authorities and decided to secure control of the College board of trustees. It accordingly passed an Act in 1816 reorganizing the College changing its title to that of "Dartmouth University," enlarging the board of trustees, and creating a new authority, the board of overseers, which should control the general policy of the institution. To this the old board of trustees objected; claiming that the State legislature had no authority to change the terms of the charter. The case going to the United States Supreme Court, Daniel Webster who represented the trustees as against the State, emphasized strongly the point that the Crown in granting the charter had in effect made an agreement or contract with the donors and founders of the College, to give it perpetual existence in a fixed definite form, in return for which the College was to confer a public benefit by disseminating moral principles of education. He contended that if such an agreement existed, the State legislature under the Constitution had no right to change or impair the obligation of the contract without the consent of the corporation. In its decision, *Dartmouth College v. Woodward*, 4 Wheaton, 518; 1819, the Supreme Court adopted this view. "This is plainly a contract to which the donors, the trustees, and the crown (to whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract on the faith of which real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the Constitution, and within its spirit also. . . ."

The next question was—is the obligation of this contract binding upon the State of New Hampshire? By the Revolution the rights and duties of the British crown and parliament had passed over to the State legislature, and when the Constitution of the United States was adopted, the legislature was bound by the clause forbidding any Act which would impair the obligation of the contract. In short, the legislature inherited the powers and duties of the British crown with the limitation that it must not change or impair the contract.

The final question was—did the New Hampshire law impair the contract or charter? After pointing out that the State law of 1816 changed the board of trustees and its powers and numbers, and established a new authority, the board of overseers, which should be under the control of the State government, the Court says:—

"On the effect of this law, two opinions cannot be entertained. Between acting directly, and acting through the agency of trustees and overseers, no essential difference is perceived. The whole power of governing the college is transferred from trustees, appointed according to the will of the founder, expressed in the charter, to the

executive of New Hampshire. The management and application of the funds . . . are placed by this Act under the control of the government of the State. The will of the State is substituted for the will of the donors, in every essential operation of the college. This is not an immaterial change.

"The charter of 1769 exists no longer. It is reorganized; and reorganized in such a manner as to convert a literary institution, moulded according to the will of its founders, and placed under the control of private literary men, into a machine entirely subservient to the will of government. This may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of that contract on the faith of which their property was given. It results, from this opinion, that the Acts of the legislature of New Hampshire, which are stated in the special verdict found in this cause, are repugnant to the Constitution of the United States."

Another side of this important principle is illustrated in the *Binghamton Bridge case*, 3 Wallace, 51; 1865. Here the State legislature had granted a charter to a corporation, authorizing it to establish a toll bridge and making it unlawful for any person to erect another bridge across the same stream within two miles above or below the company's bridge. Later the legislature authorized another toll bridge within the two-mile limit and the first corporation claimed this to be a violation of the contract in its own charter. Here again the Court upheld the charter on the ground that it was a binding contract, saying:

"The constitutional right of one legislature to grant corporate privileges and franchises, so as to bind and conclude a succeeding one, has been denied. We have supposed, if anything was settled by an unbroken course of decisions in the Federal and State courts, it was that an act of incorporation was a contract between the State and the stockholders. All courts at this day are estopped from questioning the doctrine. The security of property rests upon it, and every successful enterprise is undertaken in the unshaken belief that it will never be forsaken.

"The principle is supported by reason as well as authority. It was well remarked by the Chief Justice in the *Dartmouth College case*, 'that the objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country, and this benefit constitutes the consideration, and in most cases the sole consideration for the grant.' The purposes to be attained are generally beyond the ability of individual enterprise, and can only be accomplished through the aid of associated wealth. This will not be risked unless privileges are given and securities furnished in an act of incorporation. The *wants of the public* are often so imperative, that a duty is imposed on government to provide for them; and as experience has proved *that a State should not directly attempt to do this, it is necessary to*

confer on others the faculty of doing what the sovereign power is unwilling to undertake. The legislature, therefore, says to public-spirited citizens: 'If you will embark, with your time, money, and skill, in an enterprise which will accommodate the public necessities, we will grant to you, for a limited period, or in perpetuity, privileges that will justify the expenditure of your money, and the employment of your time and skill.' Such a grant is a contract, with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it.

"It is argued, as a reason why courts should not be rigid in enforcing the contracts made by States, that legislative bodies are often overreached by designing men, and dispose of franchises with great recklessness.

"If the knowledge that a contract made by a State with individuals is equally protected from invasion as a contract made between natural persons, does not awaken watchfulness and care on the part of law-makers, it is difficult to perceive what would. The corrective to improvident legislation is not in the courts, but is to be found elsewhere."

The protection given by the "obligation of contracts" clause is a broad and substantial one; it covers not only those contracts which the State itself has made, but also agreements made between private individuals, and safeguards them from destructive State laws. In *Sturges v. Crowninshield*, 4 Wheaton, 192; 1819, the defendant Crowninshield had made two promissory notes, both executed in New York State. Afterward the State passed a bankruptcy act providing for the usual judicial proceedings and the discharge of insolvent debtors, and making the discharge apply *to past* as well as future debtors. The Supreme Court held that the State could only regulate and control future contracts, and did not possess such a power over debts contracted before the passage of the law; these latter debts were contracts in the sense of Section 10, Article I and although they were made by private parties the State was none the less bound to respect them. A State act changing the terms of a previously made private contract, making them more favorable to either the debtor or the creditor, or releasing the debtor from his obligations, even under the form of a bankruptcy law, was a violation of the obligations of the contract, and as such was unconstitutional. This ruling of course applies only to past debts, not to those contracted after the passage of the State law. Although Congress has now passed a national bankruptcy act which supersedes the various State statutes on the subject, the *Crowninshield* case is still of practical importance since it shows that ordinary contracts not made by the State but by private persons are immune from later State laws intended to destroy their binding force.

A good recent example of the broad protection given to corporations by this clause is the decision in *Russell v. Sebastian*, 233 U. S. 395; 1914. The constitution of California, as amended in 1885,

... gas light or water, upon the government could regulate the charges. the State constitution the Economic Gas organized in 1909 and proceeded to buy a Los Angeles. It had some 3,500 customers by investing fresh capital to the extent of over laying additional mains and offering it portions of the city. On October 10, 1911, the constitution was amended to provide that any person might also establish and operate works and under such rules as the city might prescribe afterward the city of Los Angeles under the Section 19 passed ordinances making it unlawful to excavate city streets without written permission from the city works, and requiring companies engaging in such work to purchase a franchise or right from the city. On May 23, 1912, the Economic Gas Light Company applied for such a permission to excavate in the street extending its mains; the board refused such permission and the company should buy a franchise from the city. The ordinance of purchase of a franchise was contained in the constitution under which the company was organized. A requirement to purchase was made by a later ordinance. The company claimed that it was not bound to purchase but was authorized by the previous constitution to do so with the construction of its pipes and mains. The company employé, Russell, to begin construction work was arrested by order of the city officials. The ordinance...

tional pipes for new consumers it would suffer a loss of \$2,000 a month, because of the extra investments which it had made; further, that having accepted the offer contained in the State constitution, the company could not later be deprived of its right to lay mains in the streets by any subsequent change in the constitution nor by a municipal ordinance passed in pursuance of such a change, but that by the clause of the United States Constitution forbidding State laws to violate the obligation of contracts, both the State of California and the city of Los Angeles were prevented from passing additional legislation which would defeat or impair the company's implied agreement under the old State constitution. To this view the Supreme Court gave its approval. The State constitution of 1885, the Court ruled, had been accepted by the company and an obligation created which the State could not impair. This guaranteed to the company not only the right to keep its existing mains and pipes but to lay additional pipes within the city limits in the future. "As to the question of fact, the present case presents no controversy. It was averred, and not denied, that the works of the gas company were established and operated with the intent to furnish gas throughout the city, wherever needed, and that this enterprise had been diligently prosecuted; that a large investment had been made in a plant which was adequate to supply a much greater territory than that reached by the distributing mains when the amendment of 1911 was adopted; that the expense of this installation made it impossible to supply at a profit the limited territory contiguous to the streets then actually occupied by the company; and that if it were confined in its service to that territory it would sustain a constant loss." Under this ruling the "obligation of contracts" clause protects all companies which have undertaken business of a public nature in acceptance of what the Court considers an "offer" or guarantee contained in a State constitution.

In order to regain some of the regulative power over corporations which the State had lost by the earlier decisions, all the commonwealths have passed general corporation laws which provide that companies chartered in the future shall be subject to the regulation and general police laws of the State. A description of these laws is given in the Chapter on the Police Power.

**3. Which Kinds of Business May be Regulated?**—Every business is subject to regulation, whether it be manufacturing, banking, trading, transportation, or professional work. But not every business may be regulated in any way that the legislature sees fit. There are two general kinds of regulation and public control,—(a) the regulation of internal conditions to promote safety, health, and prevent fraud; examples are seen in the factory acts and the incorporation laws, which are to be examined later. (b) The other is a fixing of prices, rates, charges, or quality and kind of service, for *the benefit of the consumer and the general public.* The first kind of



regulation may be applied to any business; the second, price and service regulation, is constitutional only when applied to businesses of a *public* nature. What is a public business in this sense? Chiefly one which large numbers of people are obliged to patronize, such as a ferry or a street car line, or a gas company,—all of which are therefore largely natural monopolies; or again a business in which the public interest in honest efficient service may at times outweigh all considerations of private liberty, such as the auctioneer, the baker, the cab driver, etc.

Those callings and industries which are not of this public nature cannot be regulated by government, either as to price or service, for such a control would be a violation of the 5th and 14th Amendments, declaring that no person shall be deprived of liberty or property without due process of law. The courts hold that government interference with the price or quality of a man's goods in a *private* business is depriving him of his liberty and property to make such quality and price as he pleases. But they also hold that the words "liberty" and "property" are to be so understood only in private industries, and that the rights of the individual are subordinate to the public interest in a public business.

**4. The Regulation of Rates, Prices and Charges.**—From our earliest history callings of the above described nature, in which the community had an active interest, have been subject to public control as to both rates and the kind of service to be rendered. An interesting summary of these principles was given by the Supreme Court in the noted case of *Munn v. Illinois*, 94 U. S. 113; 1876.

In 1874 the Illinois legislature passed an Act fixing the maximum charge for the storage of grain in warehouses at Chicago and other places in the State where grain was stored in bulk. This Act was resisted by the owners of grain elevators, who urged among other grounds that it was unconstitutional, because it deprived them of property without due process of law. The Federal Supreme Court, to which the case finally came, declared that the State law was valid and constitutional and that a regulation of the rates of grain elevators in this form was not depriving the owners of their property without due process of law, so long as the rates fixed were reasonable. The Court found that from the earliest times in England, as well as in this country, the government had exercised the right to regulate rates in all sorts of *public* industries and occupations, when such regulation became necessary for the public good. This was notably true of such occupations as ferries, hackmen, common carriers, inn-keepers, bakers, millers, wharfingers, chimney sweeps, draymen, auctioneers, warehouses, turnpike roads, bridge-tolls, etc. In all of these the public interest in honest service and reasonable charges was so strong and urgent that regulation was essential to the public welfare. Any person who entered these fields, did so *with full knowledge* of the community's general interest in his business and of its legal authority over that business.

The best recent instance that can be given of the growth of public interest in a business to such a point as to subject its rates and charges to regulation is that of insurance. In *German Alliance Insurance Company v. Ike Lewis*, superintendent of insurance of Kansas, before the Supreme Court, 233 U. S. 389, 1914, the issue was squarely presented,—is insurance a business of such a public nature as to justify the State in regulating its rates? Kansas in 1909 passed “an act relating to fire insurance, and to provide for the regulation and control of rates of premium thereon, and to prevent discriminations therein.” The statute provided that the superintendent of insurance might determine any rate to be either excessive or unreasonably high, or so low as to be inadequate to the safety of the company; he might then direct the company to make a lower or a higher rate respectively. Under this power the superintendent of insurance made a reduction of 12% in fire rates which was objected to by the company on the ground that insurance was a private business, not subject to the price fixing, rate regulating power of the State. The company laid special weight on the claim that the public right of regulation of rates existed only in those businesses where a general right of any person to demand and receive services was admitted. That is, it was confined to those industries such as the railway, the telephone or telegraph, the gas supply, etc., in which any individual had the right to claim the services and the facilities of the company upon paying the appropriate fee, and that in other businesses such as insurance, where the company was free to offer or refuse its service to any customer, no such right of rate fixing by State authorities existed. The company therefore urged that a State fixing of prices in a private business was a deprivation of the company’s liberty and property contrary to the 14th Amendment. The Supreme Court held that insurance was a public business, that its various phases had been frequently regulated by the States for the sake of safety, that the amount of reserve to be deposited by the company, the form of policy and numerous other details had been fixed by law and that such regulation was admittedly within the State’s power. The extension of these rules to include the fixing of rates was a matter of judgment for the legislature to decide. The 14th Amendment in no wise forbade the rate regulation of a business of public interest. What determined when a business ceased to be private and became of public interest? The Court was unable to give any fixed, definite mark of this change. It refused to classify as public businesses only those which had a monopoly or those which had received from the public some special privilege. Justice McKenna who delivered the opinion took the broad ground that without either of these distinguishing marks a business might become of public interest through the simple fact of its necessary influence on great numbers of the people. That the insurance company *had such a close, necessary connection with the public welfare*

was shown by the widespread, almost universal necessity of insurance. "This demonstrates the interest of the public in it. . . . We can see, therefore, how it has come to be considered a matter of public concern to regulate it, and governmental insurance has its advocates and even examples. Contracts of insurance, therefore, have greater public consequence than contracts between individuals to do or not to do a particular thing whose effect stops with the individuals. We may say in passing that when the effect goes beyond that, there are many examples of regulation." The power to regulate being once admitted because of the public interest, it is merely a question of legislative policy whether the State shall include in its regulation the fixing of rates.

**Freedom of Contract.**—Property is acquired usually by contract. If Congress, or the Legislature, could take away from any person or corporation the right to make a contract, it would remove that person's ability to acquire property. This has now become so clearly and generally recognized that the Courts declare any law limiting the freedom of contract to be a violation of the Constitution, unless it can be shown to present some exceptional or unusual features. What these exceptions are will be shown in the sections dealing with the Police Power. In *Allgeyer v. Louisiana*, 165 U. S. 578; 1897, the Court, in referring to the Fourteenth Amendment, said (p. 589):

"The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." Liberty and property accordingly include the much discussed "freedom of contract" which is the right to make any contract that is not against the general policy of the country's laws. An arbitrary, unreasonable interference with this freedom, by the legislature, is a violation of liberty without due process. In *Frisbie v. U. S.*, decided in 1895, 157 U. S. 160, the Court also explained some of the necessary limits of freedom of contract. The national pension laws, in order to protect pensioners from extortionate charges by attorneys, had provided that no person acting as an attorney or solicitor for an applicant should charge more than \$10.00 as a fee. Frisbie was a lawyer who, as agent for Julia Johnson, the widow of a soldier, had secured a pension but had charged more than the \$10.00 allowed by law. When prosecuted and convicted he appealed to the Supreme Court on the ground that *the Act was unconstitutional because it interfered with the price of labor and thereby violated the freedom of contract. This claim*

the Court overruled and upheld his conviction as valid, saying—"It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessities of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property."

**Due Process of Law.**—The fourth general query in our study of constitutional protection, how far may prices and rates be fixed by government, is further answered by the "due process" clauses of the Constitution. The National Government is forbidden by the Fifth Amendment to deprive any person of life, liberty or property "without due process of law." The State governments are forbidden by the Fourteenth Amendment, Section I, to deprive any person of life, liberty or property "without due process of law." The meaning of "due process" and the close relation of these clauses to business and personal rights may be more clearly understood by a glance at the British Constitution. In their long hard fight with King John of England the Barons who forced his signature to Magna Charta, had constantly before their eyes the *arbitrary, unregulated* exactions of the king, either by taxation or by unjust court procedure, or by the willful, unjustified seizure of private property by the sheriffs and other royal officers. This constant invasion of the rights of the individual by the king so harried and exasperated the property owners of the realm that they forced the monarch to promise in the Magna Charta that no freeman should be deprived of his liberty or property, except by the judgment of his peers.<sup>1</sup>

It is "liberty" in this sense which is meant by the Fifth and Fourteenth Amendments. Every individual must be free from restraint of his person, and at liberty to use his faculties, to live and move and have his being in such ways as he will, so long as he does not interfere with others. He must have the right to enter into any lawful business, to make contracts for any legitimate purpose and to work out his own ends in the ways that best please him. This does not mean that any person may use his property or his energies in such a way as to interfere, annoy or injure others. A man may be a manufacturer, a singer, a chauffeur, an aviator, or a property

<sup>1</sup> The exact wording of this much cited clause is "No freeman shall be taken, imprisoned, disseised, outlawed, banished or any way destroyed, nor will we proceed against or prosecute him except by lawful judgment of his peers, or the law of the land."

owner, in which case his liberty under the Fifth and Fourteenth Amendments to participate in these vocations or to enjoy his property is guaranteed to him without let or hindrance; neither the State nor the Federal Government may interfere with these, without violating the amendments. But when his manufacturing or his singing annoys neighbors who may not escape from it, when he drives his car in a crowded thoroughfare at high speed, or flies his aeroplane in ways that imperil the lives and convenience of others, or uses his property to the prejudice of the general welfare, his liberty ceases, and he becomes subject to regulation, and if he or his property are so regulated he cannot claim that the amendments have been violated.<sup>1</sup>

What is "due process of law"? The meaning of this phrase has probably been disputed more than any other part of the Constitution. Briefly summarized it means,—(a) the right to a hearing before a tribunal, and (b) freedom from arbitrary, unreasonable legislative acts. Under (a) the courts have repeatedly declared that no man's property can be taken from him by a simple act of the legislature nor can he be imprisoned or deprived of his life or freedom without the proper judicial procedure. The courts have for centuries been the bulwarks of the individual against the oppression of the government. Their procedure has often changed; court fees have been high, or low; the expenses of litigation have been great or small but always there has stood between government oppression and the citizen, the latter's right to his "day in court." Any legislative act which deprived a person of his property without this opportunity to be heard in court would not be "due process." On the other hand, we must remember too that court procedure must inevitably change. Some States have a jury trial for civil cases; others have not, yet both may be due process. Some States allow a majority verdict of the jury to prevail, while others require a unanimous verdict; either of these may be due process. There are certain fundamental features of the "day in court," or the right to a court hearing, which have been described in *Twining v. New Jersey*, 211 U. S. 78, as follows:

The Court which renders the decision must be one having legal jurisdiction of the case.

Full notice and opportunity for hearing must be given to the parties concerned.

Any procedure which preserves these two principles is due process.

In the National Government "due process" is more definitely fixed in its nature because the 5th and 6th Amendments prescribe in detail the rules of procedure to be followed, for example, a Grand Jury presentment, or indictment, in all criminal cases, a Petit Jury trial, the right to confront opposing witnesses, the right to compel witnesses to attend for the defence, etc.<sup>2</sup> In civil cases also the

<sup>1</sup> See the Chapter on The Police Power.

<sup>2</sup> The Grand Jury is usually a body of twenty-four men who hear sufficient of

U. S. Courts are obliged to grant a jury trial when the matter in controversy exceeds \$20.00 in value.

This first feature in due process; viz., the opportunity for a court hearing is observed with the greatest care both in this country and in England. It has one important exception, however, in the relations of the government with its employés. In this field the courts have held both in England and here, that any government official whose accounts show a deficit, may have his property seized by the government authorities without the usual court procedure. A debt to the government takes precedence over all other claims in any circumstances and a government defaulter cannot claim ordinary judicial procedure under the due process clause when his goods are attached for the account which he owes to the government. This exception to the general principle was established in the interesting case of *Murray's Lessee v. The Hoboken Land Co.*, 18 Howard, 272; 1855. Here Samuel Swartwout, the notorious collector of customs of New York City in President Jackson's administration, defaulted, leaving a deficit in his accounts of over \$1,000,000. This debt to the Treasury was collected by a summary levy in the form of a warrant of distress upon Swartwout's property, on order of the Treasury officials and the simple recording of a lien against his property without any suit or trial. The constitutionality of this seizure of Swartwout's land having been disputed under the due process clause, the case came to the Supreme Court and it was contended by Swartwout's successor in the ownership of the property that such a warrant was unconstitutional on the ground that it did not give the defendant due process of law in the form of a court hearing. The Supreme Court decided that the seizure was in accordance with due process because of the special fact that the funds in question were a balance due to the government in Swartwout's accounts as a Treasury officer and that from the earliest times in England and in this country, the Treasury had occupied a special position in its claims on its employés and their property. The seizure of the defaulter's land being solely for the purpose of reimbursing the Treasury for its losses, such action would be legal even though no court procedure was invoked.

(b) The right to substantially just, reasonable and impartial laws is, in America, an equally important element in due process. If by an act of the legislature, a person has been flagrantly and unjustly deprived of his liberty and property, such an act violates "due process" even though the courts afterward gave the injured person a jury trial. It is not due process for Congress or the State to take the property of a corporation, or a person, by reducing its

the evidence against an accused person to determine whether there is a reasonable ground to hold him for trial. If the Grand Jury decides that there is sufficient ground, the accusation is marked a "true bill" and turned over to the District Attorney for prosecution; if it decides not to hold the accused, the accusation is dropped, or "ignored."

or his earning power below a reasonable point, and it does not become due process even though the defendant or injured party is given an opportunity to contest the law in court. The law itself must not be unreasonable, extortionate, partial, or oppressive. If it prove to have any of these defects, it is not due process, regardless of whether it provides court procedure or not. For this reason excessive taxation or regulative laws which prevent a recognized business from earning returns would both be violations of the due process clause, no matter what court procedure was applied in their interpretation.

A brief but comprehensive and clear statement of the principle that due process includes both proper procedure and just, reasonable and impartial laws, is found in the Supreme Court's opinion in *Hurtado v. California*, 110 U. S. 535; 1883. *Hurtado* had committed murder; for this he was tried under a section of the California constitution which provided that persons accused of crime might be held for trial in either one of two ways,—a Grand Jury indictment, or a process known as an "information." The latter consisted of a hearing before a magistrate with opportunity for the defendant to present evidence. If the magistrate who conducted the examination decided that there was sufficient evidence to hold the accused, he could be tried in the usual way by a jury. It was under this "information" process that *Hurtado* was held for trial, but he claimed that the "information" was not constitutional since due process required a Grand Jury indictment. The Supreme Court held that this was true of the 5th and 6th Amendments of the Constitution, which described due process in detail and which applied to the Federal Government, but that it was not true of due process as required in the 14th Amendment, which applied to the State governments; and accordingly *Hurtado* could be held for trial by the State of California, without a Grand Jury indictment. The Court showed that the 14th Amendment fixes no set procedure for the States, but allows them to have free sway so long as they do not deprive the accused of his hearing in court. It then takes up the question of whether due process also protects the accused against unreasonable, arbitrary and oppressive laws, entirely aside from methods of judicial procedure, and declares,—

"But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern

society,' and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and National, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions."

In *Murray's Lessee v. The Hoboken Land Company*, 18 Howard, 272; 1855, already cited, the Court also said, "It must be conceded that there are some rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It may be doubted, if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many."

**The Right to Federal Jurisdiction.**—One of the strong protections of national commerce against State interference has been the privilege given to all persons to remove suits from the State courts to the Federal tribunals when the parties were citizens of different States. Article III of the Constitution provides that the Federal courts shall have jurisdiction in suits between the citizens of different States. The purpose of this was to get an impartial tribunal unaffected by local prejudice or favoritism. Most of the large interstate companies are able to invoke the Federal jurisdiction because of difference of citizenship. And in recent years the State governments have attempted to block this appeal to the national courts,—some of them providing that no foreign corporation could transact business within the State if it removed local suits to the Federal courts. These State laws have raised a serious question as to the power of the Federal Government to protect interstate companies,—a question which was finally settled in *Harrison v. The St. Louis and San Francisco Railway Co.*, decided by the Supreme Court 232 U. S. 318, 1914. The State of Oklahoma had provided that the permit or license to transact business which had been issued to any foreign corporation acting within the State, should be revoked and cancelled if such corporation removed suits from the State courts. The railway company, having been sued by a citizen of Oklahoma, removed the suit to the Federal courts on the *plea that the company was a citizen of another State and therefore*



entitled to the Federal jurisdiction. In doing so, it had violated the Oklahoma law above described, and its franchise or permit to transact business within the State was promptly cancelled by Harrison, the Secretary of the State. The company thereupon appealed to the Supreme Court, claiming that the State law was unconstitutional since it deprived the company of its rights to the Federal jurisdiction as guaranteed by Article III of the Constitution. The Court ruled that the law was clearly invalid, conflicting with the Federal Constitution and the national acts governing removal of cases to the Federal courts. "It may not be doubted that the judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority is a power wholly independent of State action, and which therefore the several States may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit, or render inefficacious. The doctrine is so elementary as to require no citation of authority to sustain it."

**When is a Corporation Deprived of Its Property?**—These decisions lead to the further very practical question which is constantly reappearing under our laws—when is a person or a corporation deprived of its property? Whenever a government authority, in regulating enterprises such as railways, telephones, ferries, lighting and other public service companies, fixes a charge which is so low as to reduce the earnings below the usual rate of return on such investments, the courts hold that the company has been deprived of its property and the Constitution thereby violated. Governing bodies and commissions may reduce rates to a level that is reasonable, so long as they allow the corporation to earn a fair return on its invested capital. What percentage this return must be has never been definitely fixed. The question presented to the courts is always this—under the regulation in question can a fair rate of income be earned on the investment? The courts decide that the rate either is or is not excessively low. In general if the corporation can make a five or six per cent return the courts will not declare that its property has been taken without due process of law, provided the other features of the regulation are also reasonable. The public service commissions of the States and the Interstate Commerce Commission are constantly fixing rates, but in doing so they are forced to observe this feature of the Constitution with the greatest care. Were it not for these clauses the commissions of some States might so harass public service companies by their regulations as to destroy the earning power and thereby drive capital out of the business. These clauses have been a strong bulwark of protection against unjust and oppressive regulation.<sup>1</sup>

<sup>1</sup> Dean Hall has well said—*Constitutional Law*, page 135—"Deprivation of property may take place in a variety of ways besides sheer confiscation. The State may place such restrictions upon the possession, use, or the transfer of

A good example is presented in *Smythe v. Ames* decided in 1898, 169 U. S. 466. Here the legislature of Nebraska had passed various acts regulating the railways and authorizing a State board to fix passenger and freight rates, etc. The companies complained that their charges were, under this act, reduced to such a low point as to prevent them from making a reasonable return on their property and that they were thereby deprived of their property without due process of law. They showed that the reduction in rates on local hauls within the State amounted to about 29%, which would diminish their revenues from local business to a point below their operating expenses and thereby wipe out their earning power on business within the State. The Court said:—"These principles must be regarded as settled:

"1. A railroad corporation is a person within the meaning of the Fourteenth Amendment, declaring that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

"2. A State enactment, or regulations made under the authority of a State enactment, establishing rates for the transportation of persons or property by railroad, that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would therefore be repugnant to the Fourteenth Amendment of the Constitution of the United States."

**5. Regulation of Service.**—The important principle just described applies not only to the rates which the railways, etc., may charge, but also to the service and facilities which the government may require of the railways, such as fitting trains with automatic brakes, providing a frequent train service, etc. Here again the expense imposed upon the corporation by a government regulation might reach such a point as to interfere with the earning of a reasonable dividend. The corporation would then be deprived of its property without due process of law. In order to find out if a certain sum of net earnings of a corporation is a fair return on its business we must know what its total investment is. The measurement of the investment, upon which the rate of return shall be calculated, is not as simple as it first appears. The Supreme Court has held that the basis of calculation is the fair value of the property being used by the corporation for the convenience of the public. And in order to ascertain that value, "the original cost of construc-

property as to amount to a deprivation of some or all of its essential incidents. Legislation may attempt to change the character of an owner's title to property, or to compel special expenditures on account of the ownership or control of certain kinds of property, or to enlarge the owner's liability for damage resulting from the condition or use of property, or to limit the owner's remedies for infringement of property rights. If even such small interferences with property rights are merely arbitrary, and do not serve any reasonable or legitimate public purpose, they may be declared unconstitutional."

tion, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under the rates prescribed by law, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of property." *Smyth v. Ames*, 169 U. S. 466.

**Are other Rights of Corporations Protected?**—The general principles governing the regulation of corporations is that *interstate commerce* is subject to Federal regulation; other business is subject to the regulation of the State in which it is transacted. If the State of Delaware charters a corporation to refine oil or to manufacture tobacco, that corporation may only enter other States with its manufacturing business after securing the permit of such other States, that is, by complying with their laws passed to regulate such business. Its existence as a corporation in Delaware does not give it the right to transact business in New York or Pennsylvania without the permission of those commonwealths. The corporation is a "person" <sup>1</sup> but it does not possess all the protection which the individual natural person enjoys under the Constitution. For example, its officials may be compelled to testify in suits against the corporation, it has no personal "liberty," in the same sense that the natural person has, it is a person with power to transact business in the State which created it, but it may be refused entrance to other States, although it may not be deprived of its property without "due process of law."

**6. Class Legislation.**—The Fourteenth Amendment, Section I, provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." This clause is the great safeguard against class legislation of the States. The danger of discrimination is constantly present in the modern State legislature. Such a body is always beset by influences which demand special favors, privileges and exemptions from the law. So many of these have been granted in the past by the legislatures that most of the constitutions now forbid special legislation. The Fourteenth Amendment, which as we have seen was passed to protect the Negroes against hostile and discriminatory laws, has been broadened

<sup>1</sup> In *Santa Clara v. The Southern Pacific R. R. Co.*, 118 U. S. 394; 1886, it was claimed that a tax levied by the State of California was a denial of equal protection of the law to persons within the State and that the *Southern Pacific Railway Corporation* was a person in the sense of the 14th Amendment. An extensive brief was prepared by the railway attorneys on this point, but before argument was begun the Chief Justice said: "The Court does not wish to hear argument on the question whether the provision in the 14th Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."

in its interpretation little by little. Its protection is no longer confined to Negroes but now includes all races, foreigners or other persons, and even corporations in its scope; it has been interpreted by the courts to forbid any State laws which create arbitrary, *unreasonable* or unnatural distinctions between individuals or between different classes of people, conferring on some, special privileges which are denied to others, or visiting some with disadvantages or penalties which are not imposed on others. May certain persons be denied the right to sue in the courts? Clearly not, since such a law would be a discrimination or denial of equality. May foreigners be denied the equal protection of the laws? The Constitution in this clause protects any "persons," the word used is not "citizens," but "persons." Equal protection, therefore, extends to the alien. A child labor law of the State of Pennsylvania which required an educational test that was to be differently satisfied by foreign-born children than those born in this country, was declared unconstitutional for this reason. The law was held to be an inequality or discrimination, and a denial of equal protection, inasmuch as the arrangement for the test of foreign-born children was much more difficult than for the native born. In *Yick Wo v. Hopkins*, 118 U. S. 356; 1885, the city of San Francisco had by municipal ordinance provided that no laundries should be established in frame dwellings without the permit or certificate of a city inspector. The ostensible reason for this ordinance was to prevent fire in the frame dwelling section, and to protect the health of the community. The ordinance itself, if fairly enforced, was constitutional, but the city inspector in granting permits to laundries discriminated sharply between the Chinese and natives; 200 Chinese being denied permits, while 80 natives who applied were all given the required certificate. The real purpose of the local administration seemed to be to prevent the Chinese from engaging upon equal terms in the laundry business. This unequal, discriminating execution of the law was held to be unconstitutional, and Yick Wo and several other Chinese who had been imprisoned under the ordinance were released upon an appeal to the Supreme Court. Said the Court:—

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. . . .

"It appears that both petitioners have complied with every requisite, deemed by the law or by the public officers charged with its administration, necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the *accustomed manner*, their harmless and useful occupation, on which

they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is, therefore, illegal, and they must be discharged."

Does "Equal Protection" apply as against the class laws passed by the United States government? The Fourteenth Amendment protects the people only against the States. Would a discriminatory law, if passed by the Federal Congress, be constitutional? While nothing is said in the Constitution as to the equal protection of national laws, class legislation would probably be declared unconstitutional by the Supreme Court on the ground that being arbitrary and oppressive it deprived persons of their liberty and property without "due process of law." The broad scope which has already been given to the due process clause would undoubtedly justify such a rule. It is probable that while the exact words "equal protection" are not contained in the 5th Amendment yet their spirit is contained in the "due process" section and to that extent equal protection applies also as against the Federal Government, although to a less extent.

In practice the State legislature is obliged to classify occupations as safe or dangerous, as proper for persons under age or not, or as subject to special State regulation such as railways, or banks, or insurance companies,—and to enact legislation for each of these classes. But it is unconstitutional for the State to single out an establishment, a factory, a bank or a railway and regulate it differently from the others or to classify businesses in such an arbitrary unnatural way as to practice favoritism. In *Connolly v. Union Sewer Pipe Company*, 184 U. S. 540; 1902, an attempt had been made by the legislature of Illinois to pass an Anti-Trust law, which would prohibit combinations among all producers to restrict competition, but which excepted from this rule the producers of farm products or livestock. Here the U. S. Supreme Court declared that the legislature, in *excepting farmers* from the Anti-Trust law of the State, had not classified businesses in any proper sense but had shown an arbitrary desire to exclude, in an unreasonable way, a particular class of producers from the action of a general law. The law was therefore declared invalid as violating the "equal protection" clause of the Fourteenth Amendment.

**Exemption of Laborers from State Anti-Trust Laws.—But if**

farmers cannot be exempted from the operation of such an Act, can labor unions? One acknowledged purpose of all unions and associations of workingmen is to raise wages; they are therefore combinations to increase the price of labor. Does a State law which forbids producers and sellers to combine for the purpose of lessening competition and influencing prices, conflict with the equal protection clause of the 14th Amendment if it exempts workingmen from its application? This was the question presented in *International Harvester Company v. Missouri*, decided June 8, 1914. Here the State statute of 1909 had forbidden producers or sellers to combine in the way mentioned but it contained an express exception of laborers and their associations. The Harvester Company being prosecuted under the Act claimed that the exception was an unequal treatment of two classes of producers—laborers and manufacturers—and that this inequality, being forbidden by the 14th Amendment, rendered the State law unconstitutional and void. This view, however, the Supreme Court refused to endorse. Justice McKenna who delivered the opinion held that a simple inequality or difference in the laws does not constitute an unfair or illegal discrimination. The legislature must be allowed to use its judgment within reasonable limits as to which facts or class of facts required regulation. The Harvester Company had protested that laborers, even domestic servants and nurses, could combine, and that the law was unfair and discriminatory in forbidding some classes of producers, but not all, to combine, "and because these are not embraced in the law, plaintiff in error, it is contended, although a combination of companies uniting the power of \$120,000,000, and able thereby to engross 85 per cent or 90 per cent of the trade in agricultural implements, is nevertheless beyond the competency of the legislature to prohibit. As great as the contrast is, a greater one may be made. Under the principles applied, a combination of all the great industrial enterprises (and why not railroads as well?) could not be condemned unless the law applied as well to a combination of maidservants or to infants' nurses, whose humble functions preclude effective combination. Such contrasts and the considerations they suggest must be pushed aside by government, and a rigid and universal classification applied, is the contention of plaintiff in error; and to this the contention must come. Admit exceptions, and you admit the power of the legislature to select them. But it may be said the comparison of extremes is forensic, and, it may be, fallacious; that there may be powerful labor combinations as well as powerful industrial combinations, and weak ones of both, and that the law, to be valid, cannot distinguish between strong and weak offenders. This may be granted, but the comparisons are not without value in estimating the contentions of plaintiff in error. The foundation of our decision is, of course, the power of classification which a legislature may exercise, and the cases we have cited, as well as others which may be cited, demonstrate that some latitude must be allowed to the legis-

lative judgment in selecting the 'basis of community.' We have said that it must be palpably arbitrary to authorize a judicial review of it, and that it cannot be disturbed by the courts 'unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.'" The classification being reasonable was upheld.

"Equal protection" does not mean that all businesses must be subject to precisely the same regulation, but that the classification must be reasonable and that every enterprise within the same class of business must be equally treated. An especially dangerous business such as powder manufacture may be subjected to special safety regulations; and establishments which cause annoying odors, as soap or fertilizer factories, may well be declared a nuisance and required to remove from the vicinity of a crowded section while other factories in other classes of business are allowed to remain. This is not depriving the owner of the fertilizer or powder factory of equal protection. (See *Northwestern Fertilizer Company v. Hyde Park*, 97 U. S. 659; 1878.) Nor does it mean that every person must be treated by the public authorities in precisely the same way as all other persons in the State. For example, a foreigner in many States may not vote nor serve on a jury, nor be enrolled in the militia; insane persons are not allowed to roam freely at will; children are subjected to school laws; women are not allowed to work more than ten hours daily in a factory, yet these are not deprived of the equal protection of the law, so long as all in the same class are treated alike. An admirable summary of the entire doctrine of equal protection is given by the Court in *Barbier v. Connolly*, 113 U. S. 27; 1885, as follows:—

"The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences. But neither the amendment—broad and comprehensive as it is—nor any other amendment was intended to interfere with the power of the State, sometimes

termed its police power, to prescribe regulation to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits,—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment. . . . ”

Another very interesting example of the new meaning which is being placed on “equal protection” is found in the ruling of the Supreme Court on the anti-trust law of South Dakota, of 1907. The State legislature had provided that anyone engaged in the manufacture or distribution of a commodity in general use, who intentionally, for the purpose of destroying a competitor, discriminates between different sections of the State by selling the product at a lower rate in one section than in another, cost of transportation being considered, shall be guilty of unfair discrimination. The Central Lumber Company to whom the law was applied by the State, attacked the constitutionality of the Act on the ground that it was class legislation and was in itself a discriminatory law of the most obnoxious type, in that it applied only to certain persons and corporations of a particular kind, namely, those who sold goods in two places in the State, while other persons and corporations with the same capital in the same business, and doing the same amount of trade, would not be governed by the law, if they did not sell goods in two places. This, the company claimed, was an unwarranted discrimination which deprived it of the equal protection of the laws. The U. S. Supreme Court held, in *Central Lumber Company v. South Dakota*, 226 U. S. 157; 1912, that if a particular class of companies or individuals is engaged in doing something which is condemned by public sentiment, and is making a wrongful and harmful use of its opportunities, to interfere with the freedom of competition within the State, the Fourteenth Amendment would not prohibit the legislature from dealing with this particular evil even though *in order to do so, the legislature must establish a new class of persons*



and companies, namely, those transacting business in two places in the State. "The recoupment in one place of losses which were incurred in another part of the State may be merely an instance of financial ability to compete, but it may also be what the legislature felt that it was, a means of destroying the benefits of competition by wiping out competitors, and as such it may do more harm than good. If the legislature feels this to be so, and finds that the danger arises from a particular class of business concerns, viz., those transacting business in two or more places within the State, it may very properly provide by law that no members of this class shall engage in the evil practice mentioned. Such an Act would apply equally to all the members of the class in question and would afford them the equal protection of the law in the sense of the Constitution."

**The Federal Commerce Clause as a Protection Against State Interference.**—In our dual system of Government the States are constantly attempting to overstep the sphere of authority set for them in the Constitution, and to interfere with business and property by well-intended laws and regulations. These laws, however, often work great confusion and harm in the business world, and serve no useful purpose whatever. Many of them are clearly contrary to the letter and the spirit of the Constitution and are therefore invalid. We have seen that the commercial interests of the country strongly supported the adoption of the Constitution a century and a quarter ago, and urged that the new National Government should have the *exclusive authority* to regulate national and interstate trade. In doing so they were seeking to protect commercial interests against State interference. Accordingly the commerce clause of Article 1, Section 8, is to-day one of the strong bulwarks of protection of business interests against improper State regulation, and the business community in general looks with an unfavorable eye upon any attempt of the States to extend their power over national commerce. The Supreme Court, as we have seen in considering the Federal regulation of commerce, has not divided the Federal and State powers as sharply and clearly as might be desired. It has at various times allowed the commonwealths considerable liberty to interfere with general trade, and has to this extent limited and impaired the protection which the commerce clause gives to interstate business. We may form an idea of the present extent of this protection from the following review of decisions covering a wide range of businesses and occupations:

A State may regulate pilotage, harbor buoys, channel markers, and other local matters in the absence of Federal regulation. *Cooley v. The Port Wardens*, 12 Howard, 229; 1851.

It might, until 1899, regulate even the erection and management of drawbridges over navigable interstate streams.

It might establish local rules governing the lights to be displayed by vessels in a harbor. *The Frigate Gray v. The Ship Fraser*, 21 Howard, 184; 1859.

It may authorize the construction of a drainage and power dam across a small creek, even though that creek is sometimes entered by a sloop coming from another State. *Willson v. The Marsh Company*, 2 Peters, 245.

It may require all railway trains running in the State to abolish coal stoves on passenger cars and may apply this rule even to interstate trains until Congress acts. *N. Y., N. H. & H. R. R. v. New York*, 165 U. S. 628; 1897.

It may set up tests of vision and color blindness for railway engineers, and apply these tests even to those who drive engines on interstate trains within the State. *Smith v. Alabama*, 124 U. S. 465; 1888.

It may forbid the sale of cigarettes in the State and apply the prohibition to small packages brought in from another State, and offered for sale as original packages. *Austin v. Tennessee*, 179 U. S. 343; 1900.

It may even forbid the sale within its borders of deceptively colored oleomargarine and imitations of butter, and apply the rule to oleomargarine imported from another State. *Plumley v. Mass.*, 155 U. S. 461; 1895.

But it may not prevent the sale in original packages of oleomargarine brought in from other States, if not colored to resemble butter, nor sold under fraudulent misrepresentation. *Schollenberger v. Penna.*, 171 U. S. 1; 1898.

A State may provide, for the convenience of its people, that all railways in the State must stop at least three trains daily each way, at cities and towns on its line, which have a population of three thousand or over, and where a sufficient number of local trains are not provided it may require an interstate train to stop at such towns, in order to make the required number of three. *L. S. & M. S. v. Ohio*, 173 U. S. 285; 1899.

But it may not compel an interstate railway to stop *all* its regular passenger trains at county seats located on its line, since this would be a serious interference with interstate commerce which might readily be avoided by a more reasonable regulation. *C., C., C. & St. L. v. Illinois*, 177 U. S. 514; 1900.

Nor may a State require the stopping of a fast through interstate train at a small hamlet or village, when such village could be adequately served by a regulation of local trains. *The Atlantic Coast Line v. R. R. Commissioners of South Carolina*, 207 U. S. 328; 1907.

A State may not, *without the consent of Congress*, prevent the importation of intoxicating liquors from another State, nor their sale in original packages inside its borders. *Leisy v. Hardin*, 135 U. S. 100; 1890. But it may regulate such sale in original packages when Congress expressly permits it to do so. *In re Rahrer*, 140 U. S. 545; 1891.

*Nor may a State regulate interstate commerce by requiring*

persons who wish to bring such commerce into the State, to register and pay a fee to the State Treasurer. International Text Book s. Pigg, 217 U. S. 91: 1910.

7. Other Safeguards Against Government Interference.—Besides the above-mentioned protections of business and personal rights there is also the protection of the privileges and immunities of citizens of the United States against State action. The 14th Amendment, Section 2, provides that "no State shall make or enforce any law abridging the privileges and immunities of citizens of the United States." We have already seen in surveying other Constitutional Protections, the origin and purpose of this section. But it overshot the mark in threatening to place all citizens under the protection of the Federal Government. The ominous words in the last section of the amendment "Congress shall have power to enforce the provisions of this Article by appropriate legislation," seemed to empower Congress to intervene actively in State matters and threatened to wipe out the powers of the States at a single stroke. What could not Congress undertake in legislating to protect citizens of the United States against State action? Would not the entire business and civil rights of the people be henceforth regulated by National, not State, legislation? These questions were answered by the Supreme Court in the Slaughter House cases, 16 Wallace, 36; 1873, and Civil Rights cases, 109 U. S. 3; 1883. In the Slaughter House controversy the State of Louisiana had conferred upon the Crescent City Live Stock Company a monopoly of the slaughter house business within the city of New Orleans. A number of independent butchers complained that they were thereby prevented from carrying on their business within the city limits and in a suit which was carried to the Federal Supreme Court they claimed that in so doing the State had deprived them of the "privileges and immunities of citizens of the United States," contrary to the clause of the Constitution above mentioned. They set forth that it was certainly the right of a citizen of the United States to engage in business and that whenever a State deprived him of this right it violated the Fourteenth Amendment. The answer of the Supreme Court shows in an illuminating way the methods by which our courts are often obliged to give a new meaning to the words of the Constitution in order to prevent such words from becoming too drastic or revolutionary in their scope. The Court declared that it was not the purpose of the Fourteenth Amendment to blot out the State governments nor to place them at the mercy of Congress nor even to give Congress control over all the business regulation of the country, but only to authorize Congress to prevent violations by the States of the rights of *United States citizens*. There are, said the Court, two kinds of citizenship,—State, and National. Citizens of the United States residing in any State enjoy the rights of both State and U. S. citizenship. What was the difference  
ber- rights? In general a man's rights as a

State citizen were those which he derived from the State constitution and the State legislature. On the other hand, the rights of a United States citizen were those derived from the Federal Constitution and the Federal laws and treaties. "Generally speaking," said the Court, "we may ascertain whether a given right is a right of a State or U. S. citizen by tracing it to its source. If its source is in the Constitution and laws of the United States we must look to the National Government for its protection. If it be founded on State constitutions and State laws, we must look to the State governments for its protection."

Some illustrations of these two classes of rights are as follows:

*Rights of  
U. S. Citizenship*

To come to the seat of government to transact business with the National Government, to seek its protection, share its offices, to enjoy access to its seaports and to the sub-treasuries, land offices and courts of justice. *Crandall v. Nevada*, 6 Wallace, 35; 1865.

To demand the care and protection of the Federal Government over his life, liberty and property when he is on the high seas or abroad.

To use the navigable waters of the United States and to secure the privileges guaranteed to American citizens by National treaties.

To acquire State citizenship upon acquiring a domicile or residence within the State.

*Rights of  
State Citizenship*

To secure protection from the State government.

To acquire and possess property of every kind.

To pursue their happiness subject to State legislation for the general good. *Corfield v. Coryell*, 4 Wash. C. C. 371; 1823.

To engage in business.

To maintain suits in State courts.

To enjoy the general rights of State citizens when resident in other States.

Applying this to the Slaughter House cases, the right to engage in the business of butchering, the Court found to be based on State laws. It was therefore a right of State citizenship and was protected by the State, *not by the United States*. If Louisiana decided to regulate sanitary conditions by limiting the general freedom of its citizens to engage in the abattoir business, it could do so, and its action did not in any way violate the rights of United States citizenship under the Fourteenth Amendment. This sweeping decision had the immediate effect of re-establishing the State control over domestic business and personal rights.

**Does the Constitution Protect One Person as Against the Acts of Another?**—We must remember that the Fourteenth Amendment forbids States, not individuals, from violating the rights of other persons. If one *individual* deprives another of his property or liberty, illegally, the remedy is to appeal to the State laws, not to the Fourteenth Amendment, which applies only to the State governments. An example of this principle is shown by the unconstitutional national Act of May 31, 1870, which was passed to enforce the Fourteenth

Amendment; here Congress had provided that citizens of the United States should be free from intimidation, injury or oppressions while in the exercise of their rights under the Constitution and Federal laws, and that *if any person* should interfere with that freedom, or attempt to injure, oppress, or intimidate a citizen, to prevent his enjoyment of his rights under the Constitution, such persons should be guilty of a felony and liable to fine and imprisonment. A violation of this statute had occurred in Louisiana through the interference of a band of white persons with a number of colored people who were about to hold a meeting. The whites were arrested and prosecuted under the Federal Act mentioned, and were charged with conspiring to intimidate citizens of the United States who wished to avail themselves of the right of assembly. The case being taken to the United States Supreme Court, *U. S. v. Cruikshank*, 92 U. S. 542; 1876, it was decided that the whites could not be convicted under the Act, because the Fourteenth Amendment, which the Act was designed to enforce, did not protect citizens of the United States from interference or intimidation *by other persons*, but from such interference *by the State governments*. The amendment declares that "no State shall deprive." When a disorder occurs in which citizens of the United States are injured or their rights violated, it is therefore clear that their proper protection is not in the Fourteenth Amendment, unless the State government is clearly implicated in the attempt to interfere with their rights as citizens of the United States. If the disorder or injury is caused by other persons the Fourteenth Amendment clearly does not apply. It "adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which apply to every citizen as a member of society." An equally interesting problem was presented in the Civil Rights cases, 109 U. S. 3; 1883. Here Congress had passed a law to enforce the Fourteenth Amendment, entitled "An Act to protect all citizens in their civil and legal rights." This law made it criminal for any person to deny to any citizen on account of race or color the full and equal enjoyment of inns, public conveyances, theaters and other places of amusement. A number of colored persons having been refused accommodations in a hotel, the management was prosecuted under the Act, and the case being appealed to the Supreme Court, that tribunal decided that the Fourteenth Amendment gave Congress the power to make laws enforcing the amendment, but not the power to regulate domestic internal affairs within the States. The amendment prohibited a State government from discriminating between whites and blacks in its general legislation, but this by no means prevented a hotel-keeper or theater manager from making such a discrimination, nor did the amendment give to Congress any power to regulate theaters or hotels. This power *still remained* in the control of the States. If a State had enacted a law excluding

m hotels, such a law might possibly prove

invalid under the Fourteenth Amendment, and Congress had full power to pass laws which would prevent the State governments from making such discriminations. Congress had power "to adopt appropriate legislation for correcting the effects of such prohibited State laws and State Acts, and thus to render them effectually null, void and innocuous." This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. "An apt illustration of this distinction may be found in some of the provisions of the original Constitution. Take the subject of contracts for example. The Constitution prohibited the States from passing any law impairing the obligation of contracts. This did not give to Congress power to provide laws for the general enforcement of contracts; nor power to invest the Courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts. It did however give the power to provide remedies by which the impairment of contracts by State legislation might be counteracted and corrected; and this power was exercised." Applying this same principle to other questions, the Fourteenth Amendment does not forbid railway companies to provide separate cars for persons of the colored race nor does it prevent a theatre management from excluding persons on any ground whether of race, color or other distinction, because a railway or a theater is not a State and it is only the State government which is forbidden from committing Acts of discrimination. The State legislature itself may provide by law that the colored and white races shall be separately or equally accommodated on railway trains within the State; that has already been approved by the Supreme Court in *Plessy v. Ferguson*, 163 U. S. 537; 1896, but such a law would be unconstitutional if it provided that the accommodations for the colored race should be inferior or superior to that of other races because this would be denying equal protection. Nor could a State exclude white or colored persons from the theaters and hotels by law, even though it is legal for the managers, as private individuals, to do so. While these principles have been established chiefly in race questions, they apply as well to other affairs not connected with racial differences. The Fourteenth Amendment does not regulate business or other concerns between private individuals but only between the State and the individual.

**Have Corporations the Full Rights of Citizens?**—While corporations enjoy most of the rights which the Constitution gives to "persons" they have not the rights of "citizens" in the broad, general sense of the Constitution. They cannot claim the right to transact business in any State of the Union which they choose; they cannot demand protection under Article 4, Section 2, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." If they could, they might

demand entrance to any commonwealth in the Union and the privilege of transacting business regardless of State licenses or permits. In *Pembina Mining Company v. Pennsylvania*, 125 U. S. 181; 1888, the Court said: "Corporations are not citizens within the meaning of that clause. This was expressly held in *Paul v. Virginia*, 8 Wallace, 168; 1868. In that case it appeared that a statute of Virginia, passed in February, 1866, declared that no insurance company not incorporated under the laws of the State should carry on business within her limits without previously obtaining a license for that purpose. . . . A subsequent statute of Virginia made it a penal offence for a person to act in the State as an agent of a foreign insurance company without such license. One Samuel Paul, having acted in the State as an agent for a New York insurance company without a license, was indicted and convicted in a Circuit Court of Virginia, and sentenced to pay a fine of \$50. . . . Here it was contended, as in the present case, that the statute of Virginia was invalid by reason of its discriminating provisions between her corporations and corporations of other States; that in this particular it was in conflict with the clause of the Constitution mentioned, that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. But the Court answered, that corporations are not citizens within the meaning of the clause; that the term citizens, as used in the clause, applies only to natural persons, members of the body politic owning allegiance to the State, not to artificial persons created by the legislature, and possessing only such attributes as the legislature has prescribed; that the privileges and immunities secured to citizens of each State in the several States by the clause in question are those privileges and immunities which are common to the citizens of the latter States under their constitution and laws by virtue of their citizenship; that special privileges enjoyed by citizens in their own States are not secured in other States by that provision; that it was not intended that the laws of one State should thereby have any operation in other States; that they can have such operation only by the permission, express or implied, of those States; that special privileges which are conferred must be enjoyed at home, unless the assent of other States to their enjoyment therein be given; and that a grant of corporate existence was a grant of special privileges to the corporators, enabling them to act for certain specified purposes as a single individual, and exempting them, unless otherwise provided, from individual liability, which could therefore be enjoyed in other States only by their assent."

**Changes in Constitutional Protection.**—In all of these ways the Constitution has set up bulwarks against the misuse of political power in both nation and State. It would almost seem as if every contingency had been provided for and that the business man, the farmer, the mechanic, the producer and the consumers were amply protected at every point which the Constitution could reach. But

if we re-examine these parts of our fundamental law, it becomes clear that most of them were adopted at times when the business conditions were far different from those now prevailing. A Constitution is, after all, the expression of the political thought of a people under the conditions of a certain time. Change the surroundings and the time and a new need for constitutional protection arises. So it is with the nature and the purpose of the clauses which we have just examined. They need to be amplified, revised and completed, that they may protect our liberty and rights and encourage and promote our welfare under the new circumstances of the present. Our Constitution still aims to protect liberty but liberty in a new and broader sense which we shall examine under the Police Power.

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#### QUESTIONS

1. You are explaining to an European how our Federal Constitution is arranged to prevent sudden changes in the form of government. Outline your explanation.
2. Make a brief list of the main features of the Constitution arranged in two groups: (a) those which you consider the essential fundamental parts and (b) those which you think might be changed without altering the essential nature of the government. In which group would you place the powers of Congress? Would you favor any changes in these powers?
3. Why is the present method of amendment so difficult to operate?
4. By which method was the income tax amendment passed?
5. How long did the agitation in its favor last?
6. Why was the amendment providing for the direct election of senators so often and so easily defeated?
7. In a discussion of the Constitution it is urged that the fathers in 1787 were gifted with such unusual ingenuity that they invented a well-nigh perfect instrument and that we should not attempt to improve on their work, in these troublous and unsettled times. What would be your view of this opinion?
8. In a discussion you are desirous of showing the existence of an unwritten Constitution in the United States. Outline your argument with examples.
9. You wish to show that the Supreme Court has sometimes changed the meaning of the words of the Constitution. Example.
10. Resolved, that the method of amendment of the National Constitution should be made less difficult—take either side.
11. Why were the first ten amendments to the Constitution adopted?
12. Do they apply to the National Government, to the States, or to both?
13. The owner of a building finds that its value has been reduced by the erection of a large public playground next door. He complains to the courts on



the ground that the State in establishing the playground has lessened the value of his property and thereby deprived him of property without due process of law, contrary to the 5th Amendment. What would be the answer of the courts and why?

14. The first man condemned to be electrocuted in New York appealed to the United States Supreme Court on the ground that the punishment was cruel and unusual,—it being at that time new in this country,—and that it therefore violated the 8th Amendment which declares that "excessive bail shall not be required nor excessive fines imposed, nor cruel or unusual punishments inflicted." Decide the case with reasons.

15. Why are the first ten amendments sometimes called the "Bill of Rights"?

16. How would you explain to a foreigner the chief liberties and safeguards contained in the Federal Bill of Rights?

17. Why were the 13th, 14th and 15th Amendments passed?

18. Explain the chief differences between the purposes of these amendments.

19. Your State legislature passes a law providing that bankrupt debtors shall be imprisoned at hard labor. John Doe fails in business. Must he go to jail? Reasons.

20. A colored man is denied the right to vote because he cannot comply with the State law requiring voters to pass an educational test. He claims that the law is unconstitutional under the 15th Amendment. Decide with reasons.

21. The Doe Baking Company establishes its plant in the State of X where the State Constitution provides that any person or corporation may engage freely in the baking business upon compliance with reasonable standards of sanitation and purity of products. Five years later the State Constitution is revised and an article inserted allowing cities to regulate the baking business. The city in which the Doe Company has located passes an ordinance requiring all bakeries to secure a permit and to pay \$500 therefor, before transacting further business. The Doe Company protests on constitutional grounds. Decide the case with reasons.

22. A railway company is incorporated under the State law in 1854 with the charter right to charge not more than 5c per mile for passenger fares. In 1873 the State Constitution is amended, giving the rate fixing power to the legislature. The latter body passes a law fixing 2c per mile as the highest passenger charge in the State. Constitutional? Reasons in full.

23. In 1915 John Doe makes a promissory note to Richard White with interest at 5%. The note is renewed and in 1916 the State legislature passes a law cancelling all promissory notes made within the last year at more than 4% interest. Doe, under the law, refuses to pay and the case comes to the Supreme Court. Decide with reasons.

24. Explain the Supreme Court's decision as to whether the Dartmouth College charter of incorporation made by the King of England was a contract. Give reasons in full.

25. Show exactly how the enlargement of the Board of College Trustees by the New Hampshire Legislature was or was not a violation of the U. S. Constitution.

26. How do the States now regain the power over corporations which they have lost through the Dartmouth College v. Woodward decision?

27. Explain the constitutional difference between price or rate regulation and safety regulation; also the different types of business to which these forms of regulation apply.

28. Which of the following enterprises might be constitutionally regulated in the way mentioned, and why:

(a) State law providing that shoes must be labelled on the box "all leather" or "composition leather," according to the materials used in manufacture.

(b) State law providing that oleomargarine colored to resemble margarine, if manufactured

- (c) State law fixing the price of shoes at \$4.00 per pair.
- (d) State law requiring that all shoes shall be made only of thoroughly seasoned calf skin leather.
- (e) State law providing that all barber shops must remain open until 12 midnight on Saturdays.
- (f) State law requiring that railway stations within the State must remain open until one hour after the last train has passed through, each day.
- (g) State law requiring that alcohol used for medicine if manufactured for sale within the State must be 90% pure.
- (h) A State law fixing the charges of storage for grain in elevators within the State.

29. What is "freedom of contract" and how is it protected by the Constitution?

30. Congress passes a law providing that attorneys who secure or aid in the securing of land grants for homesteaders must not charge more than \$15.00. Mr. Sharpe, an attorney, secures such a grant for his client and renders a bill for \$50.00. When prosecuted under the Act he claims that the law interferes with his freedom of contract. Decide with reasons.

31. Prepare a brief essay on "due process of law" showing its origin, its meaning in England and the special meaning which it has acquired in the United States.

32. John Doe is arrested for violation of a speed ordinance requiring automobiles to observe the fifteen-mile limit. He protests, claiming that the automobile is his property and that he may not be deprived of his liberty or property nor his right to do as he pleases with it, without due process of law. Decide with reasons.

33. The city councils pass an ordinance authorizing the police to seize and sell immediately any automobile which exceeds fifteen miles per hour in speed and pay the proceeds into the city treasury as a fund, without further formality or other procedure. Explain the constitutional status of this ordinance and the exact part of the Constitution which applies.

34. The State legislature provides by law that the manufacture of shoes shall no longer be permitted in the State. Is the Act constitutional? Reasons.

35. A provision is inserted in the California constitution allowing persons to be tried for crime, either upon an indictment found by a grand jury or an information (accusation and hearing before a magistrate). Would such an information be valid under the Federal Constitution? Reasons.

36. Congress passes an Act providing for a similar procedure by information in Federal criminal cases. Is it constitutional? Reasons.

37. A State constitution provides that the legislature may by law dispense with jury trials in civil cases. Is the State constitution valid under the Federal Constitution?

38. Congress passes a law providing that in all civil cases the trial shall be without a jury. Is the law valid? Reasons.

39. A State legislature, pursuant to the State constitution, provides that a simple majority verdict of the jury shall be sufficient to convict in criminal cases. Is the law constitutional?

40. Mr. John Swift secures a political appointment in the National Government. At the end of his term he is \$10,000 in arrears in his accounts. The government attaches his bank balance and pays it into the treasury. He protests, claiming that his property has been taken without due process of law as he was given no hearing at all at the time of the attachment. Decide with reasons and precedent.

41. Do the words "due process" as used in the 14th Amendment mean the same procedure in all the States and at all times?

42. A State Commission passes two resolutions, one providing that the old rolling stock of a poorly managed city trolley company shall be taken from it by public officials in order to force it to buy new cars; the other resolution provides that street car fares must not exceed 1c each and that free transfer tickets

must be given to all intersecting lines. Explain in detail the constitutional status of each of these resolutions.

43. The legislature provides that reasonable room for sitting or standing without excessive crowding, must be provided in every street car and that passengers must not be allowed to ride on the front or rear platform. Is this constitutional?

44. In another law the State requires that all passengers must be provided with seats and that street cars must be run with sufficient frequency to accommodate all who desire passage; further that only steel cars may be used, that flag men must be stationed at every intersecting line and that an extra brakeman must be carried on every car to aid in its control. Explain fully the constitutional status of this Act.

45. A railway subject to State regulation claims that the rules of the State are so burdensome as to deprive it of its property; the State claims that it is able to earn a handsome return on its investment. How would the question be decided?

46. In a suit under the due process clause, to prevent excessive State regulation the State authorities answer that a corporation is not a person and that the 14th Amendment protects only persons against State action. Decide with reasons.

47. Could a State forbid corporations which transact business within its limits to transfer their lawsuits from the State to the Federal courts, under penalty of having their licenses or charters forfeited? Reasons and authority.

48. What is class legislation? Give an example.

49. Does the Constitution expressly forbid class legislation by the United States, or by the States, or by both? Cite the clause in question.

50. The mayor of Bytown acting under a city ordinance which forbids Italians from carrying arms proceeds to disarm all unnaturalized Italians within the city. One of them protests claiming that the mayor is violating the Federal Constitution, to which the official answers that the equal protection clause safeguards only citizens, not unnaturalized foreigners. Decide with reasons.

51. A State law provides that no person shall practice medicine without a license or permit from the State to be granted by the State medical board. This board then proceeds to admit all applicants who are American born and to reject all foreigners. A foreign applicant protests and shows that he is qualified but has been denied a permit. The board answers that the law itself is a perfectly constitutional, protective measure and has been adopted in one form or another in all the States. Decide the controversy with reasons and precedent.

52. A State provides that doctors, dentists and druggists must be licensed before practicing their profession but requires no such license for the practice of accountancy. A dentist protests on the ground that he is denied the equal protection of the laws because of the discrimination in favor of accountants. Decide with reasons.

53. A State law forbids combinations in restraint of trade in all forms of industry except the manufacture and sale of agricultural implements. Is the Act constitutional? Reasons in full.

54. A State provides that companies transacting business in more than one place within the State must not reduce their prices at one point in order to drive out or destroy their competitor, while maintaining prices at another. A defendant company prosecuted under the Act claims that the law violates the 14th Amendment in that it does not affect all companies engaged in the same business but applies only to a particular, arbitrarily chosen class; viz., those transacting business in two or more places, and as such is class legislation. Decide with reasons and precedent.

55. John Doe and Company, Richard Roe and Company and others are engaged in the manufacture of gunpowder. Owing to frequent explosions and loss of life and property, the State government builds a special gunpowder plant and rents it to the Safety Powder Company giving the company an exclusive monopoly of powder manufacture within the State. The Doe and Roe Companies claim that this is a violation of the 14th Amendment in that it deprives

them of the privileges and immunities of citizens of the United States. Decide with reasons and precedent.

56. You are explaining to a friend which of his rights are the privileges and immunities of a citizen of the United States and why. Outline your explanation.

57. Give some privileges of citizens of a State with examples. Arthur Jackson, William Johnson, Henry White and George W. Snow, all colored citizens, are holding a meeting with the purpose of passing a resolution declaring their constitutional rights. They are interfered with and the meeting broken up by a disorderly mob of white persons. The Federal law passed in 1870 provided that citizens of the United States should be free from intimidation or oppression by other persons while exercising their rights under the Federal Constitution and laws. Could members of the mob be punished under the above Act? Explain with reasons and precedent.

58. Congress passes an Act forbidding the proprietors of hotels, public conveyances and places of amusement from discriminating against citizens of the United States on account of their race or color. A hotel keeper refuses admission to a colored man on that ground. Can he be punished under the Federal law? Reasons and precedent.

59. May a railway company constitutionally provide separate accommodations for whites and colored within a State?

60. May it constitutionally provide inferior accommodations for either race?

61. May a State constitutionally require railways within its boundaries to provide separate accommodations for the two races?

62. May it require such railways to provide superior accommodations for the colored race?

63. Can a corporation claim that having been chartered in Delaware it is entitled to transact business in Illinois under Article 4, Section 2 "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States"? Reasons and authority.

## CHAPTER XXIV

### STITUTIONAL PROTECTIONS—Continued THE POLICE POWER

Liberty?—In all our discussion of the protection of rights we have come upon the constantly recurring question. The old idea of liberty was freedom from government action. For this reason the State and National Constitutions were framed with an idea of preventing government action. It seems, it is yet true that our constitutions devote much attention to that the Federal and State governments may *not* do things which they may. But as we ask more and more of the government as its usefulness grows, we cease to think of liberty as freedom from government action, and realize that such action is necessary. This brings on the conflict between an "individualistic" policy of government,—the conflict that is in full vigor in American politics.

**Individualistic View.**—We have always believed that a man was entirely responsible for his own success or well-being, and that a criminal because of his own vicious propensities was

failures, their moral or dishonest acts, is due to their surroundings. The "social environment" of a man, the newspaper, the school, the church, the office, the home and his other surroundings, bring to bear upon him such a constant, overwhelming and irresistible stream of influences that they *determine* what his action will be under most circumstances. The abnormal man or the insane may not respond to these influences, or he may react against them in an entirely unexpected way, but the normal person is guided largely by this social force. When the public school system teaches hygiene, when the magazines and newspapers discuss health problems, when the street-car advertisements preach breakfast-foods, and the boards of health of large cities issue bulletins on individual health and efficiency,—the average man inevitably begins to think of and care for his body, because his entire social environment guides him. If his health is so strongly influenced by his environment, how much more so his moral and educational training, his recreation, his efforts towards industrial efficiency and a comfortable standard of living, in short his personal welfare! As the importance of environment in this welfare increases, the conclusion forces itself upon us that we must put forth every effort to make that environment more favorable, and that our government authorities must co-operate much more effectively towards this end than they have in the past. In all those many ways in which the community influences us, the community must make its influence more useful. In brief we have made a start on social "team work." This new point of view, which sets a newer and higher standard of government work, is to be seen in the most unexpected and interesting ways and places; the platforms of our political parties, the programs of new societies, the magazine and newspaper editorials, the drama and fiction of the hour,—all show a gradual but impressive strengthening of the belief that we cannot foist upon the individual all responsibility for his disease or health, his success or failure, his crime or honesty, but that the government itself as an agent for the whole people must now do its utmost to open up the avenues of progress. The government must help. This is the "social" view.

**The New Liberty.**—Seen from this angle, "liberty" takes on a new and greater meaning. Freedom from disease, from the handicap of inefficiency and illiteracy, from overcrowded and indecent dwellings, and uncleanness, are incalculably more important to us than the old legal freedom of contract which once occupied the center of the stage. In order to contrast the older, more formal ideal with this new substantial liberty let us place the two side by side in parallel columns.

*The Older Constitutional Rights*

1. Right to the equal protection of the laws.

2. The right of persons accused of crime to be safeguarded in criminal trial procedure.

3. Freedom of speech, press and religion.

4. No person shall be deprived of life without due process of law.

5. Freedom from compulsory quartering of soldiers in time of peace; freedom from searches and seizures in homes and dwellings.

6. No person shall be deprived of liberty or property without due process of law.

7. Right to bear arms.

*New Economic and Social Rights*

1. Equal opportunities for all in the Open Market:

(a) The equal use of public facilities such as railways, canals, terminals, warehouses, wharves, etc.

(b) Freedom from unfair and corrupt methods of business competition,—fraud, misrepresentation, combinations to destroy a competitor, exclusive contracts to stifle competition, etc.

2. Right to real protection against criminals. Cheaper and quicker justice.

(a) A simplified, less technical procedure in both civil and criminal suits.

(b) A more complete, efficient and thorough police system in both city and country districts.

(c) A more careful sifting of the chance offender from the habitual criminal.

3. The freedom of the consumer from extortionate and oppressive charges in all articles of common use, meats, foods, drugs, beverages, shoes, clothing, coal, tobacco, sugar, oil, express and transportation charges.

4. No person shall be deprived of the opportunities for improvement, education and recreation, even with due process of law.

5. Freedom from overcrowded, unsanitary houses, factories and stores; right to tenement and factory inspection and regulation.

6. Right to full participation in economic progress and a salary or wage payment that will support a reasonable standard of living.

7. Right to æsthetic and other higher enjoyments of civilization.

We must see clearly that the old legal freedom was a means to an end. When men were fighting a tyrant king or a selfish mother country they wanted liberty "to pursue happiness" or "freedom of speech" both of which were denied them. When their business is assailed by a combination, or their own and their children's chances of advancement are blocked by one or another cause, they demand greater "freedom of business opportunity." The obstacles to progress are different, the meaning of "liberty" changes. Various publicists view this new meaning in different lights. One of the best statements is by Walter E. Weyl in his *New Democracy*—

"We are emphasizing the overlordship of the public over property and rights formerly held to be private. A new insistence is laid upon human life, upon human happiness. What is attainable by the majority—life, health, leisure, a share in our natural resources, a dignified existence in society—is contended for by the majority against the opposition of men who hold exorbitant claims upon the continent. The inner soul of our new democracy is not the unalienable rights, negatively and individualistically interpreted, but those same rights, life, liberty and the pursuit of happiness, extended and given a social interpretation."

**The Police Power.**—These new economic and social rights are threatened less by the *government* than by organized *private* "groups" and "interests" which, in a strong desire for profit, are willing to ignore the public welfare. Such conditions must needs be regulated by the public authority. Our economic rights accordingly call for fewer safeguards against the government and more against private abuses. How can we adapt the old legal liberty of the 18th century to the new economic and social freedom of the 20th? How can we harmonize an intentionally inactive government system with the new demands for greater activity? This problem is being worked out by the "Police Power" of the National and State governments,—that is, the authority to protect the health, comfort and safety of the people, and to provide for their welfare.

Our modern idea of the Police Power starts from the Supreme Court decision in *Dartmouth College v. Woodward*, 4 Wheaton, 518; 1819, which has already been considered. The ruling in that case took away from the State government such a vast share of the regulating power over the corporations which it had chartered, that it seemed as if, after a company had once secured a charter of incorporation, it would be forever exempt from further State action. If this were so, the corporations of the land must soon become utterly irresponsible and uncontrollable. That is, something which the State itself had created would henceforth be completely independent of the very State which created it. Furthermore, since a corporation charter is a perpetual grant, the irresponsible bodies thus formed would live forever, secure from all control. Such a condition would be dangerous in the extreme, both to the people and to the State government. Immediately the latter began to insert in new charters a clause providing that the State might change the charters in certain important respects whenever it saw fit. It even went further, enacting general corporation laws which declared that all future companies must submit to the ordinary protective Police Power of the State. But this was not enough. There were already in existence many thousands of companies chartered before these changes in the State law had taken place. Under the *Dartmouth* decision, they were free from State control. How should the State win back its authority over these? No legislative act could



do this, nor could even a law of the Federal Congress, for the Constitution itself protected these charters, as contracts.

The answer was given by the courts in their doctrine of the Police Power. In a series of remarkable decisions they declared that the authority of a State to protect the lives, health, and safety of its people was such an essential, inherent, vital power as to be of the very core and substance of State government and that the "obligation of contracts" clause of the Federal Constitution was never intended to interfere with this *protective* authority of the commonwealth. The Police Power could prevent even a chartered corporation from doing anything which was dangerous to the people and so long as the State used this power within reasonable bounds, and for the purposes above mentioned, no corporation could claim that its charter was a contract exempting it from all State regulation, especially on such necessary and fundamental points in which the whole community had an immediate public interest. Nearly all the legislative measures now in the forefront of public discussion are exercises of the police power. The creation of boards of health with authority to prevent the spread of contagious diseases, the establishment of compulsory continuation schools, the prohibition of railway rebates or discriminations, the encouragement of agriculture, and the requirement of fire escapes and proper standards of safety in building construction are all examples from widely different fields of the use of this authority.

**New Problems Under the Police Power.**—As the power has steadily expanded, it has come into further conflict with the liberty and property clauses of the Fifth and Fourteenth Amendments and with the ruling of the Supreme Court in the Dartmouth College decision. This conflict has grown more and more serious until it has become clear that we must either change the wording of those amendments and allow the State and National Governments to regulate and alter property rights and personal liberty and contracts—this would require an amendment to the Constitution, or we must let the words stand, but have a new series of court decisions changing the meaning of "liberty" and "property" so as to allow of their regulation by the government. We have adopted the second way out of the dilemma. Let us consider a number of these judicial rulings and see what has been their bearing upon the public regulation of business. They are focussed mainly on the following points:

1. Does the Police Power apply to all persons and corporations or may it be evaded by any?
2. Can a corporation escape regulation by a clause to that effect in its charter?
3. How far can the new Police Power interfere with "liberty" and "property" as guaranteed by the Constitution?

1. **The Power Controls All Corporations and Persons.**—Nobody except a foreign diplomat or consul can disobey the protective regulations of the Police Power. The Supreme Court has even declared

that a State government may not constitutionally bargain away this authority nor may it agree with any persons or corporations to exempt them from such necessary regulation, since that would be a denial to others of the equal protection of the law. In *Stone v. Mississippi*, 101 U. S. 814; 1879, the State of Mississippi had granted a charter to an association to conduct a lottery within the State. Afterwards the State amended its constitution and inserted an article prohibiting all lotteries. The association appealed to the Federal Supreme Court claiming that this was a clear violation of its contract as expressed in its charter, and that under the decision in *Dartmouth College v. Woodward* already described, the State could not constitutionally repeal or change the charter of a company without its consent, but was legally bound to allow the company to continue its lottery business regardless of future State legislation. The Supreme Court said: "The question is therefore directly presented, whether, in view of these facts, the legislature of a State can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. *No legislature can bargain away the public health or the public morals.* The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself." Again, referring to lotteries: "They disturb the checks and balances of a well-ordered community. Society built on such a foundation would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what, 'by the casting of lots, or by lot, chance, or otherwise,' might be 'awarded' to them from the accumulation of others. Certainly the right to suppress them is governmental, to be exercised at all times by those in power, at their discretion. Anyone, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is suspension of certain governmental rights in his favor, subject to withdrawal at will. He has in legal effect nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the State. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal."

**2. Can Any Business be Exempted from the Police Power?—**  
The *Stone Lottery* decision shows that the State may regulate lot-

teries or prohibit them in spite of the company's charter. This important principle was even more broadly expressed by the decision in the Boston Beer Company's case. Here the State legislature had granted in 1828 a charter to the Company, for the "purpose of manufacturing malt liquors in all their varieties." The right to manufacture admittedly included the right to sell the liquors so manufactured. Subsequently after a local option law had been passed, the sale of beer by the company was declared illegal, and certain of its liquors seized for violation of the law. The question then arose, did not the *charter* of the company entitle it to manufacture and sell its product in spite of the local prohibition law afterwards enacted? The Supreme Court in *Beer Company v. Massachusetts*, 97 U. S. 25; 1877, declared that the charter could give the Company no such exemption from subsequent police laws of the State. "The plaintiff in error boldly takes the ground that, being a corporation, it has a right, by contract, to manufacture and sell beer forever, notwithstanding and in spite of any exigencies which may occur in the morals or the health of the community requiring such manufacture to cease. We do not so understand the rights of the plaintiff. The legislature had no power to confer any such rights.

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

**The Police Power Over Nuisances.**—Is a charter to conduct a legitimate and moral business an inviolable agreement if the business occasions discomfort or annoyance to the people of the surrounding district? Or may the enterprise be regulated despite its charter? In the case of the *Fertilizer Company v. Hyde Park*, 97 U. S. 659; 1878, the legislature of Illinois had chartered a company with the right of manufacturing fertilizers within the State, no limits being set to the location of the company's plant. The factory having been situated in a suburb of Chicago, and the population having grown up around the plant, some complaint was made to the local sanitary authorities that the fertilizer factory caused obnoxious odors and constituted a nuisance. The authorities ordered that the nuisance be abated or removed, whereupon the company appealed to the courts. The case ultimately reaching the United States Supreme Court, a decision was rendered upholding the authority of the sani-

tary officials to order the abatement of the nuisance, despite the charter. The court declared that the original charter of the fertilizer company undoubtedly was an agreement between the company and the State, under the Dartmouth College ruling, but that this agreement did not and could not exempt the company from the police power of the State to protect its people from unhealthful or obnoxious nuisances. If the company's business necessarily caused such noisome odors it became its duty to prevent these odors from annoying or injuring the surrounding population. Even the fact that the company had located its plant in its present situation before the surrounding residences were built, could not exempt it from the police power as represented by the sanitary authorities. This case is especially interesting because it shows that even where the charter is construed as a contract, the courts uphold, whenever possible, the protective, regulating power of the State.

**Protection of Public Health.**—In making provisions for public health, our legislatures have been allowed the fullest freedom, the courts having so interpreted the words "liberty" and "property" that they do not form an obstacle to any reasonable health regulation as long as the rule falls equally upon all, without discrimination.

One of the earliest laws in this field was passed on in the case of the Commonwealth *v. Hamilton Manufacturing Company*, 210 Mass. 383; 1876. The Massachusetts legislature had passed an Act in 1874 limiting the hours of women in factories to ten daily and sixty weekly. The Hamilton Manufacturing Company of Lowell, having employed a woman in its Lowell Cotton Mills sixty-four hours weekly, the company was prosecuted under the Act and demurred on the ground that the employé in question was twenty-one years of age, and therefore entitled to all the rights and freedom of contract of any adult in making an agreement with her employer covering the hours of labor. The company claimed further that the State law in so far as it applied to adult women was a violation of the property and liberty of the individual and contrary to the Fourteenth Amendment. The Massachusetts Supreme Court overruled the demurrer and declared the State Act constitutional as a means of preserving the health of the community; it held that the purpose of the Act was not to interfere with the freedom of the individual to work as many hours as she chose, but rather to prevent, for reasons of health, excessive and continuous labor by women in factories, and that this was a reasonable and natural precaution which was well within the powers of the State.

One of the striking ways in which legislatures have limited the freedom, liberty and property of the individual for the protection of health and safety is the regulation of the medical, dental, legal and other professions. Yet these regulations have been uniformly upheld, the courts declaring that they are not a violation of the intent of the liberty and property clause of the Fourteenth Amendment. In *Dent v. West Virginia*, 129 U. S. 114; 1889, the question

was presented, can a State prohibit persons from practicing medicine unless they have received a certificate or license from a State Board. The effect of such a law, it is clear, is to bar out not only those who may wish to practice in the future, without a certificate, but even those who have been practicing in the past, but whose qualifications do not satisfy the requirements of the Board. A law of West Virginia passed in 1882 required the practitioners of medicine within the State to obtain a certain certificate from the State Board of Health. This certificate was only granted upon conditions fixed by the law, among which was that the practitioner must have graduated from a reputable medical college, or must have practiced medicine for ten years before the passage of the Act, or must satisfy other requirements. Dent having practiced medicine six years before the passage of the law, and having presented to the State Board the diploma of a medical college which was rejected by the Board on the ground that it was not "reputable," and having thereupon continued to practice despite the Act, was prosecuted and convicted. He claimed that the law was unconstitutional in that it interfered with his vested right in the practice of his profession, thereby violating his liberty, contrary to the Fourteenth Amendment; also that it destroyed his property in rendering valueless to him the text books and instruments which he had purchased and used in the practice of his profession. The case going to the U. S. Supreme Court, Justice Field rendered the decision as follows:—

"The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.

"Few professions require more careful preparation by one who seeks to enter than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetable

and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications. Due consideration, therefore, for the protection of society may well induce the State to exclude from practice those who have not such a license, or who are found upon examination not to be fully qualified. The same reasons which control in imposing conditions, upon compliance with which the physician is allowed to practice in the first instance, may call for further conditions as new modes of treating disease are discovered, or a more thorough acquaintance is obtained of the remedial properties of vegetable and mineral substances, or a more accurate knowledge is acquired of the human system and of the agencies by which it is affected. It would not be deemed a matter for serious discussion that a knowledge of the new acquisitions of the profession, as it from time to time advances in its attainments for the relief of the sick and suffering, should be required for continuance in its practice, but for the earnestness with which the plaintiff in error insists that, by being compelled to obtain the certificate required, and prevented from continuing in his practice without it, he is deprived of his right and estate in his profession without due process of law. We perceive nothing in the statute which indicates an intention of the legislature to deprive one of any of his rights. No one has a right to practice medicine without having the necessary qualifications of learning and skill; and the statute only requires that whoever assumes, by offering to the community his services as a physician, that he possesses such learning and skill, shall present evidence of it by a certificate or license from a body designated by the State as competent to judge of his qualifications." Accordingly the Court held the law to be constitutional and declared that the plaintiff's right to practice his profession must be subject to the Police Power in its protection of the public health. The proper exercise of this authority for such protection was not a violation of the liberty and property clause of the Fourteenth Amendment.

**State Regulation Must be Reasonable.**—In making rules for the various occupations which it regulates, the State must not fix arbitrary nor unreasonable requirements,—its regulations must conform to existing principles and facts and may not without reason bar out of the occupation large classes of well-qualified persons. In *Smith v. Texas*, 233 U. S. 630, 1914, the Supreme Court considered a law of Texas forbidding any person from acting as *conductor on a railroad train within the State without having pre-*

viously served for two years as a brakeman or conductor on a freight train. The purpose of the Act, although somewhat obscure, was probably to insure a more thorough training of railway passenger conductors. Smith was a man 47 years of age who had been 21 years in the railway business. He had served for 12 years as engineer on freight and passenger trains. In 1910 he acted as conductor of a train without previously having been a brakeman. He was evidently a thoroughly competent man for the position and conducted his train in safety; but, having failed to serve as a freight brakeman before acting as conductor, he had violated the State statute and was prosecuted and fined. On appeal by Smith to the Supreme Court the State argued that it was the practice for brakemen on freight trains to be promoted to the position of freight conductors and then to the position of conductors on passenger trains; the law, the State contended, was in substance an enactment of the prevailing usage on the railway. But the Court pointed out that the rule fixed by the State law excluded all persons from the position of conductor except freight brakemen or freight conductors, regardless of their competence, training or ability. It showed further that an engineer was conspicuously well fitted for the work of a conductor and, in fact, shared the responsibility of a train with the conductor and, under the rules of all railways the freight engineer acted as conductor in the event of the regular conductor being disabled *en route*. By thus limiting unduly the class of persons who could contract to serve as conductors the law denied to Smith and to many other well-qualified persons the freedom of contract which is secured by the liberty and property clause of the Fourteenth Amendment, and was therefore unconstitutional. "A statute which permits the brakeman to act,—because he is presumptively competent,—and prohibits the employment of engineers and all others who can affirmatively prove that they are likewise competent, is not confined to securing the public safety, but denies to many the liberty of contract granted to brakemen."

A long series of other important laws have been upheld by the courts on grounds similar to those which we have considered, viz.,—the protection of health—and have been declared entirely harmonious with the spirit and intent of the Fifth and Fourteenth Amendments. Among these are Acts forbidding harmful adulterations of food; and prohibiting the sale of harmful drugs. The right to slaughter cattle may be given exclusively to certain individuals or corporations with a view to protecting the public health. The hours of labor in dangerous industries may be regulated. The working hours of women and children may be restricted. The importation of diseased persons or of property which may spread disease, either from abroad or from one State to another, may also be forbidden.

All of these limit the liberty or the property of the regulated persons in the severest way, yet they are not considered violations of

the liberty or property rights under the Constitution, because they are necessary for the public health. The judiciary here has taken a progressive stand. But in some other points the courts have looked with a more jealous eye upon the Police Power and have declared that such regulations are constitutional only when grave imminent danger to health exists. For example, the Federal Supreme Court declared invalid a New York law which limited the working hours of men in bakeries to ten per day, the Court holding that baking was not an industry dangerous to the health of the workers, and that the Police Power could not limit the hours of adult men in ordinary safe industries, where no serious danger to health existed.<sup>1</sup>

**Morals.**—In regulating morals also the greatest freedom has been allowed to governmental authorities by the court decisions interpreting the amendments. This has been true especially of laws to suppress or limit the sale of intoxicating liquors, gambling and vice. We have already seen that State laws against lotteries have been upheld, even though such laws destroy property in the lottery business. But the amount of property invested in lotteries is but trifling as compared with the hundreds of millions of dollars invested in the brewing and distilling industries. When the State governments began to pass prohibition laws forbidding the manufacture or sale of intoxicating liquors, the question at once arose—is this not a destruction of property within the meaning of the Fourteenth Amendment, and if so can the State law be upheld in face of the provision that no State shall deprive any person of property without due process? This question was decided in the case of *Mugler v. Kansas*, 123 U. S. 623; 1887. In 1881 Kansas had passed a prohibition law which forbade the manufacture or sale, except for medicinal purposes, of all intoxicating liquors. Mugler being convicted under the State law of selling beer, appealed to the national Supreme Court, claiming that the State law violated the liberty and property clause of the Fourteenth Amendment. The Court however upheld the State law, and ruled that although “the buildings and machinery constituting these breweries are of little value if not used for the purpose of manufacturing beer; that is to say that if the statutes are enforced against the defendants, the value of their property will be very materially diminished” yet “there is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil. If, therefore, a State deems the absolute prohibition of the manufacture and sale, within her limits, of in-

<sup>1</sup> *Lochner v. New York*, 198 U. S. 45; 1905.



toxicating liquors for other than medical, scientific, and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives."

The same holds with regard to other regulations of public morals. The Federal Government has enacted statutes prohibiting the circulation in the mails or in interstate commerce of obscene literature, or of persons, or articles intended for an immoral purpose. In *U. S. v. Popper*, 98 Federal, 423; 1899, such legislation was approved by the Circuit Court. The defendant, who was prosecuted for circulating such articles in violation of the statute, claimed that his constitutional liberty under the Fifth Amendment was thereby violated. The court however held that no person has a constitutional liberty, nor a property right to do any immoral thing, and that when forbidden by law, he may not claim constitutional protection for such acts or property. A similar decision, upholding the Federal Statute against interstate transport of lottery tickets, was delivered in *Champion v. Ames*, 188 U. S. 321; 1903. This case we have already considered in Chapter IX.

Congress thereupon attempted a still more urgently needed exercise of its regulative power in the White Slave Traffic Act of June 25, 1910. This law, which has already been described in the same Chapter, was upheld by the Supreme Court in a notable decision, *Hoke v. U. S.*, 227 U. S. 308; 1913.

This sound ruling has established on a firm footing the Federal control and protection over all forms and aspects of interstate business.

**Safety.**—In legislation for public safety we have the most sweeping recognition of the Police Power, even when in opposition to property and personal rights. Employés and the public may be protected in factories, stores and shops; hours of labor in dangerous businesses may be limited by law; safety appliances of various kinds may be required. In short, the right of the individual to do what he will with his own is subjected to the most rigid scrutiny and regulation for safety's sake. All these new principles in our constitutional law have been wrought by industrial changes, which have created new dangers to life and limb and have made it essential that we establish and maintain a more extended legal protection of all classes, even at the cost of the older constitutional rights. One of the statesman-like decisions which have ushered in this new viewpoint is that in *Holden v. Hardy*, 168 U. S. 366; 1898. Here the legislature of Utah had passed an Act in 1896 providing that "the period of employment of working men in all underground mines or workings, shall be eight hours per day, except in cases of emergency," also applying the same limit of hours to smelters. This Act differs from the others that we have considered in that it is not intended as a protection to women and

children, who are regarded for physical reasons, as subject to special protection by the State, but applies rather to adult males working in the two dangerous industries of mining and smelting. The question presented was whether a State can limit the contract-making power of adult men to work as long as they please daily, in any business which they choose to enter. Holden had employed a mine-worker for ten hours daily and a laborer in a smelter for twelve hours daily. He was prosecuted and convicted under the Utah Act but appealed to the Supreme Court on the ground that the law was unconstitutional because it deprived him and all employers and employés of the right to make contracts in a lawful way and for lawful purposes. He claimed also that it was class legislation and not equal or uniform in its provisions, and deprived him of his property and liberty without due process of law.

After reviewing the two general classes of laws which have limited the freedom of contract and have yet been upheld as constitutional, Justice Brown, who delivered the opinion of the Court said:—"An examination of both these classes of cases under the Fourteenth Amendment will demonstrate that, in passing upon the validity of State legislation under that amendment, this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some of the States methods of procedure, which at the time the Constitution was adopted were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals, had proved detrimental to their interests; while, upon the other hand, certain other classes of persons, particularly those engaged in dangerous or unhealthful employments, have been found to be in need of additional protection." After showing how this protection has been given by a number of changes of a fundamental nature in the State laws, the Court then says of these changes:—"They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the States of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land.

"Of course, it is impossible to forecast the character or extent of these changes, but in view of the fact that from the day Magna Charta was signed to the present moment, amendments to the *structure of the law* have been made with increasing frequency.

it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and, particularly, to the new relations between employers and employes, as they arise. . . ." Examining the freedom of contract further the Court says:—"This right of contract, however, is itself subject to certain limitations which the State may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employes as to demand special precautions for their well-being and protection, or the safety of adjacent property. While this court has held, notably in the cases of *Davidson v. New Orleans*, 96 U. S. 97; 1877, and *Yick Wo v. Hopkins*, 118 U. S. 356; 1885, that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety or morals, or the abatement of public nuisances, and a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests."

The Court then pointed out that the growth of manufacturing had created new conditions and peculiar dangers, which required protective legislation—fire escapes in hotels, theaters and factories—the safeguarding of machinery in factories, the protection of walls, elevators, ventilation shafts and destructive harmful gases in mining,—all these, said the Court, are new kinds of legislation designed to meet the new conditions arising from the development of our coal and iron supplies. Yet these laws have been upheld as constitutional and they do not violate the spirit of the Fourteenth Amendment by limiting property or liberty further than is necessary for the protection of the general safety. "But if it be within the power of the legislature to adopt such means for the protection of the lives of its citizens, it is difficult to see why precautions may not also be adopted for the protection of their health and morals. It is as much for the interest of the State that the public health should be preserved as that life should be made secure." The Act did not limit hours of labor in all employments, but only in certain ones which the legislature rightly considered dangerous; it was accordingly declared to be a valid and constitutional exercise of the police power.

**The Federal Railway Safety Acts.**—The Supreme Court has repeatedly upheld the attempts of Congress to provide for greater safety upon interstate railways, and has declared valid and constitutional the law of 1907 limiting the number of hours of persons employed in the operation of interstate trains to sixteen per day. The Court held that this was a proper exercise of the Federal power to regulate commerce and that the law would even apply with

binding force to employés who were engaged partly in interstate train operation and partly on intrastate trains. It declared that if Congress had the constitutional authority to protect passengers and property on interstate trains it was fully empowered to use all proper means towards this end, and its authority could not be interfered with nor lessened by the fact that some employés on interstate trains were also engaged on other matters not ordinarily subject to the jurisdiction of Congress. *B. & O. v. Interstate Commerce Commission*, 221 U. S. 612; 1911.

**Fraud.**—The power to prevent fraud is also widely recognized by the courts at the expense of both liberty and property. The adulteration of foods and drugs is being rapidly made both illegal and unprofitable by State and National laws, and the popular demand is rapidly growing that similar frauds in other articles of common use should be made impossible. In all of these the courts have upheld the legislature in its effort to protect the public welfare.

Examples of this power have been considered in *Plumley v. Mass.* and *Schollenberger v. Pa.* in Chapter X. These cases clearly show the extent and limits of the State authority.

**The Police Power and Social Justice.**—By this survey we have now seen how our Constitution is being gradually so interpreted as to allow the Police Power to protect the people against many harmful practices and dangerous evils, even though this protection involves some sacrifice of liberty and property rights as guaranteed by the amendments. In doing so the courts have really modified the meaning of the terms "liberty" and "property" and have often placed the general welfare above these rights of the individual. The Police Power may regulate harmful businesses, and at times prohibit them, it may require even legitimate enterprises to observe the public convenience and comfort, it may protect the public health, safety and morals and in doing so it may even interfere with fundamental private rights, if necessary. We come next to the important problem of regulation for the purpose of improving the economic and social conditions of the people; this is the constitutional side of the great "social problem" which is becoming the storm center of American politics. Is it constitutional for government authorities to protect the weak against the strong even to the extent of interfering with liberty or property? Is the simple principle of "social justice" sufficient to render a law constitutional? Our courts have never admitted this. But they have established a number of exceptions which do expand the police power in this direction. Some of these are the laws affecting—

Sailors,  
Laborers,  
Debtors,  
Women,  
Trade Combinations,

*An excellent description of the gradual progress of the courts in this*

field is given by Dr. Ernst Freund in his valuable work *The Police Power*. From the early days of our history the judges have upheld laws to protect the weaker classes in all the above mentioned list, on the ground that such classes were peculiarly liable to exploitation. Sailors are proverbially unable to care for themselves on land; they are especially subject to imposition and extortionate practices, a fact which has been freely recognized by both law makers and judges. The Federal statutes, upheld by the courts, have accordingly protected the sailor in the following ways:—

Masters or owners of vessels in the coasting trade must pay a seaman's wages within two days after termination of the agreement, or at the time when the seaman is discharged; in the foreign trade the payment must be made within 24 hours after discharge of cargo, or within 4 days after the discharge of the seaman. Any failure to do so entitles the seaman to his usual wages while waiting. The seaman cannot make an agreement to give up his lien or claim on the vessel for unpaid wages, nor can he agree to forfeit his claim for wages in case the vessel should in the future be lost, nor may he assign his claim for wages nor for salvage of another ship, nor may wages be paid in advance. The seaman's contract or "articles" must be signed by him in the presence of the shipping commissioner. All these regulations are frank recognitions of the fact that the sailor needs unusual protection—they all limit his and his employer's freedom of contract, yet they are sustained as a constitutional use of the National Government's power over commerce and maritime jurisdiction.

**Labor Contracts.**—In laborers' contracts the courts have allowed to both National and State Governments an increasing authority to limit the freedom of contract of the individual. The hours of labor of women and children may be fixed for the sake of health and safety. Even the hours of adult men may be limited as we have seen in certain dangerous industries, such as mining, smelters, railways, etc., the thought here being that for the *safety* of the employé and of the public at large, the "liberty" of the individual to contract for longer hours may be denied by the legislature. The courts also look on labor contracts differently from an ordinary property contract, for although they will often in equity, force an ordinary contracting party to carry out the exact terms of his agreement by special writ and court orders, they will not so compel a laborer. Again, a workman injured through his employer's fault has a claim for damages against his employer; the legislature and the courts usually forbid him from signing away or selling this claim in advance of the injury, because they wish to protect him from being imposed upon; yet both courts and legislatures allow the sale or waiver of many other rights or claims. The workman is also further protected in many *States* by a law providing that he cannot be held for a labor contract *extending* over a longer period than two years, *unless the agreement is in writing*. In all these respects both the workman and the em-

ployer find that their freedom of contract, and thereby their general liberty, is limited for the better protection of the weaker party, yet the courts will not interpret this as a denial of their liberty or property as prohibited in the 5th and 14th Amendments. Debtors who are being oppressed by extortionate rates of usury are also shielded by special legislation from money loan "sharks," and the bankruptcy law of all countries provides that an honest debtor may after a court distribution of his available funds be discharged from his debt altogether. Here is an undoubted limitation of the property right of the creditors and its only excuse is to prevent the crushing of the debtor under the accumulated burden of his obligations, just though they may be. Again the State and National lawmakers have passed statutes to prevent oppressive combinations in trade, which might suppress competition and drive out of business the weaker competitor. Such laws are difficult to enforce but they unquestionably prevent the grosser forms of trade abuses and their constitutionality is now upheld by all the courts. Here the lawmaker aids the consumer but he also frankly avows his intention of preserving the weaker competitor and in doing so he deliberately fixes limits upon the freedom of competition and the use of property so that both liberty and property rights are restricted.

**Recent Extensions of the Power.**—In all of these latter fields the courts have firmly established the principle that government may intervene to protect the weak from oppression, not on grounds of preserving the public health, the public safety, or the prevention of fraud—but purely on the basis of the social welfare. In this policy the weak have been protected *because they were weak*, and the lawmaker, upheld by the judge, has taken strong measures to limit and curb the vested rights of property in order to establish "social justice." In the now famous decision of the U. S. Supreme Court in *Noble Bank v. Haskell*, 219 U. S. 104; 1911, Justice Holmes said that the police power "extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

How far can the police power go in limiting the freedom of contract to protect social welfare? In *Chicago, Burlington and Quincy v. McGuire*, 219 U. S. 549; 1911, this question was presented in an interesting form. The railway company had established a relief plan, which provided for sickness and granted benefits, but had stipulated that an injured man's acceptance of such benefits from the Relief Fund should release the company from liability for injury under the law. In 1898 the State of Iowa provided that all railway corporations should be responsible for damages arising through the injury of their employes caused by the neglect of the railway corporations, also that no contract of insurance or relief made before the injury, nor any acceptance of such relief or insurance after the injury should excuse the company from its liability under the

law. McGuire was injured in 1900. He was a member of the relief plan, and as such, he had accepted \$822 in relief benefits. In spite of this he sued the company and recovered \$2,000. The company appealed to the Supreme Court on the ground that the Iowa statute violated the freedom of contract of the company and thereby conflicted with the liberty and property clause of the 14th Amendment. Justice Hughes in delivering the opinion of the Supreme Court based his decision upon the following points:—Had the legislature power to enact a law which provided that railway companies should be liable for injuries arising from their negligence or that of their employes? Undoubtedly it had, and the power had been upheld in numerous previous decisions of the Court. But if the legislature had this power, it must necessarily also have the authority to forbid any contracts which would defeat the power. Clearly if employes of a railway company could be persuaded to sign away their right before any injury occurred, they could readily be required as a condition of employment in the company, or of advancement in its service, to make such an agreement, and thereby they would lose the benefits which the law was intended to give them. Clearly too, if employes could be coerced or persuaded into signing contracts to abandon their claim for damages against the company, the very purpose for which the law was enacted would be defeated by such contracts, and the injured workman would lose a large proportion of the benefit which the law was intended to give him. Accordingly, the State in its police power to protect the safety and welfare of its people, has not only the authority to establish liability for accidents, but to forbid contracts which would destroy this liability. Great stress was laid by the company in its defence, upon the fact that McGuire, as a member of the relief system, had accepted sums of money amounting to \$822 although this very system provided that in doing so he waived his claim to damages against the company. But this, said Justice Hughes, was nothing more than carrying out a contract which the law prohibited and which it had a right to prohibit. If the State was empowered to forbid such contracts, it certainly could forbid also the acceptance of money under this contract. Accordingly, McGuire was in no way bound to or by that section of the relief plan which forbade him to sue in case of injury, because that section was forbidden by the Iowa statute, and was simply a means of evading the statute. McGuire's right to sue still remained, and the State's authority to forbid any contracts which would destroy his right to recover damages, was not a violation of the freedom of contract of the company. Freedom of contract does not mean an absolute right to make any contract, whatsoever, regardless of the laws of the State or United States, nor does freedom of contract prevent the State or Congress from protecting the welfare and safety of the people.

~~and~~ **Prosperity.**—We cannot close this con-  
ity without a word as to its true place

in government. The wonderful results which seem almost within our reach by a proper use of this important protective power have led some of our people to believe prosperity is only a matter of proper lawmaking, that if we choose the right public officials, elect good law makers and appoint competent judges, our business and social problems will be solved and prosperity and peace must reign within the land. This idea that the government, instead of the man, is at the root of all prosperity is an old thought, yet it continually crops up in some new form. Frederick the Great, of Prussia, declared that *he* would make his subjects prosperous, whether they wanted to be or not. In some of the Central American Republics the more ignorant class of peons are persuaded that political liberty means freedom from work, and that the adoption of North American republican institutions would in itself bring an end to all business troubles. In Porto Rico and the Philippines the advent of American liberty meant to many of the natives a happy day, when all work should cease. So, among our own people there are numbers who firmly believe that if the national and State governments did their part, property would be fairly divided, each individual having a good share, and that wealth and affluence must prevail in all classes. They accordingly hold that the Police Power should not only protect and promote all forms of business and social improvement but must relieve the individual of all responsibility for his own success. The logical result of this reasoning is the socialistic theory of the State according to which all means of production, land, factories, real estate, and movable property, must be taken over by government authorities and administered for the welfare of all the people. While very few Americans believe practically in this doctrine, some are already asking that the sphere of government be enlarged to cover such new public industries as mining, iron and steel making, warehousing, banking, insurance, and many other forms of industry and commerce.

But we must remember that the Police Power of both nation and State is first and foremost protective. It can prevent dangers to health, safety and morals, it can safeguard us against the grosser forms of exploitation, in short it can save us from the sacrifice of all our natural and human resources to the interest of a few favored, privileged classes or individuals, but it cannot guarantee each man success in the "pursuit of happiness;" it cannot act as an over-seeing providence to guard a man against all his own mistakes. What the Police Power must do is to train personal efficiency, open the doors of opportunity, mark out certain limits of social responsibility, and within these limits provide an open road and a favorable environment, and make this country "a good place to live." That this work has begun in earnest and is being carried forward with success is now clear from the strong array of statutes and decisions which we have considered,—all tending towards the *steady, progressive expansion of this important power.*



## REFERENCES

- FREUND: *The Police Power.*  
 HALL: *Constitutional Law.*  
 MCGEEHEE: *Due Process of Law.*  
 REEDER: *The Validity of Rate Regulation.*  
 WEYL: *The New Democracy.*  
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## QUESTIONS

1. Mention some of your most important constitutional rights. Place them in column form on paper.
2. State opposite each right whether the Constitution guarantees it against the National Government, the States, or both, or against other persons.
3. Outline briefly the individualistic view of personal welfare and public policy. Explain its advantages.
4. Summarize the social view of this same problem and show how environment affects personal welfare.
5. Contrast the formal, legal view of liberty with the newer demands for economic and social freedom and give examples.  
 Explain why so many persons who have complete constitutional liberty under our present conditions are dissatisfied with our constitutional and legal system.
6. What are your impressions as to the practical importance of the new demands for economic freedom?
7. Are the regulative laws which are now being passed in both State and nation intended to protect us from government authorities or from the encroachment of private interests? Reasons.
8. Explain the doctrine of the police power, showing its origin.
9. Why does the police power necessarily come into conflict with the amendments of the Constitution?
10. Show the various possible ways of settling this conflict and state which one we have adopted and why.
11. Does the power apply to all persons and corporations? Reasons.
12. Upon payment of a large sum of money to the State treasury a Casino Company is given the right by a State law to conduct a Monte Carlo at a large seashore resort in the State. Later, in response to public sentiment the State legislature passes a law forbidding gambling at any point within the commonwealth. The Casino Company protests on the ground that its existence is expressly permitted by the former State law and that this right cannot be taken from it without violating the obligation of contract clause of the Federal Constitution. Decide with reasons and precedent.
13. The Grandfather's Rye Distilling Company is incorporated under a State law permitting the business. The Company's charter authorizes it to manufacture and sell spirituous liquors. Later a prohibition law is passed by the State legislature. Can the company be prevented from conducting its business? Reasons and authority.
14. The Acme Slaughterhouse Company is chartered by the State of Nebraska with the expressly mentioned right of slaughtering, preparing and packing animals and meats for food and industrial purposes. It has many by-products among others, glue. A small town grows up around its plant and many of the citizens complain of the odors from the glue factory. Can the local board of health compel the company to stop the inconvenience or discomfort to the citizens? Reasons.
15. A board of health compels all persons in a given district to be vaccinated against smallpox. John Doe objects on the ground that his liberty is violated contrary to the 14th Amendment. Decide with reasons.
16. The State passes a law limiting the number of hours of work for women in factories and stores. The All-Day department store employs Mary Ryan for a longer period than is permitted by the law. Both the store and Mary Ryan

testify that their liberty and property are taken from them by the Act, the store because it will have to pay other persons for the rest of the day and Mary Ryan because she cannot earn as much commission as she otherwise would. Decide the case with reasons and precedent.

17. A State requires druggists to take out a license after passing an examination showing their proficiency. The Prescription Drug Store Company is fined for violation of the Act and appeals to the Supreme Court on the ground that its liberty and property have been taken from it by the Act. Decide with reasons and precedent.

18. An additional Act is passed requiring druggists before receiving a license to have served at least two years as salesmen in some kind of a retail store. Constitutional? Reasons and authority.

19. The State legislature passes a law restricting the hours of work for both men and women to eight per day in department stores. Constitutional? Reasons and precedent.

20. The D. T. Distilling Company owns a large distillery in a State where intoxicating liquors may be sold on payment of a license fee. The State legislature passes a prohibition act reciting in the Act that the purpose is to reduce crime and immorality due to intoxication. The D. T. Company objects on the ground that its property is worthless except for purpose of distilling and that it will be an almost complete loss under the new prohibition law. Decide the case with reasons.

21. Congress passes an Act prohibiting the passage of obscene literature in interstate commerce or through the mails, on the ground of immorality. A large publishing company prints objectionable postcards, sends a shipment of the cards to a dealer in another State. The company is prosecuted under the Federal law and protests that its cards are its own property which, under the 5th Amendment it can use as it pleases. Outline the company's defence more fully and the decision of the court with reasons and authority.

22. Congress forbids the sending of lottery tickets in interstate commerce or through the mails. The Success Lottery Company ships its tickets from Sacramento, Cal., to Reno, Nev., and is prosecuted for violation of the Act. Its defence is that if the sale of lottery tickets is immoral, such sale took place within the State of Nevada and is subject only to the laws of that State. It is not subject to the regulation of Congress as the tickets were not offered for sale while in transit. Decide the case with reasons.

23. Could Congress forbid the passage interstate of persons as well as articles, for an immoral purpose?

24. Can the hours of labor for men be constitutionally limited to nine per day in the railway business? Reasons and authority.

25. If a competent body of medical authority testified that the given industry X generally considered safe, was, in the light of newer scientific researches the cause of certain serious diseases, would the Supreme Court uphold the constitutionality of a State law limiting the hours of labor of men in that industry? Reasons and authority.

26. A State passes a law forbidding the sale of imitation silk within the State unless the imitation cloth is so branded or marked or labelled, the purpose being to prevent fraud and deception. A retail dealer who is arrested for violation of the Act claims that the imitation silks which he sold were brought in from another State and were therefore in interstate commerce, having been sold in the original package. Decide the case with reasons and authority.

27. Would the decision have been different if the law had forbidden the sale of imitation silks under any condition? Reasons and authority.

28. May the State legislature pass any law that it pleases to remedy social injustices? Reasons.

29. Could it provide that all property must be surrendered to the State which would then divide it equally among all the people? Reasons.

30. Can the United States or a State regulate the contracts of sailors in such a way as to require witnesses in order that the contract shall be valid?

31. A Federal law requires that sailors' wages must be paid within two days

after the end of the agreement. A vessel owner complains that this is a violation of his liberty in making contracts and is therefore unconstitutional. Decide with reasons.

32. A State usury law provides that no more than 6% interest may be charged on ordinary debts. Is this in violation of liberty and property under the 14th Amendment? Reasons.

33. A corporation prosecuted under the Sherman Act claims in its defence that the law is unconstitutional because it prevents persons from making such contracts and agreements as they please and therefore violates their liberty and property under the 5th Amendment. Decision with reasons.

34. A State forbids employers making contracts with their workmen to provide that the workmen will not sue the employer for damages if they are injured in the course of employment. Would such a law be constitutional? Reasons.

35. An employer makes a contract of this nature with one of his workmen and gives him \$500 to sign it. Later the workman is injured and sues his employer in violation of the contract. Is the contract binding?

36. Give Justice Holmes' doctrine of the police power in *Noble State Bank v. Haskell*.

37. Prepare a short essay on the extent and nature of the police power showing its limits, its necessity and its dangers and giving your impressions as to the extent to which individual welfare is dependent upon government action and individual effort respectively, with examples from your own observation.

## CHAPTER XXV

### CONSTITUTIONAL PROTECTIONS—Continued TAXATION

**Protections against Unconstitutional Taxes.**—Another field in which the rights of all classes need special provision and care is that of taxation. Most of the constitutional safeguards that we have been considering, are also strong protections against improper State tax levies.<sup>1</sup> Of these the most important are the "liberty and property," and the "equal protection" clauses and the commerce clause of Section 8 of Article 1. The latter by giving to Congress the control of interstate trade, prevents the States from interfering by taxation with that form of business. We shall consider the chief problems which have come up in this field under the following heads:

The public purpose of taxation.

State taxes on the Federal Government.

On bonds of other States.

On its own bonds held by non-residents.

On national trade.

On railways and other carriers.

On ordinary business corporations engaged in interstate trade.

State taxes favoring the products of its own soil.

State taxes with progressive rates.

The need of a revision of the State tax system.

**The Public Purpose of Taxation.**—May a State or city government tax its people for any purpose that it pleases? This question which often arises, was ruled on in the case of *Loan Association v. Topeka*, 20 Wallace, 655. A law of Kansas had authorized cities "to encourage the establishment of manufactures and such other enterprises as may tend to develop or improve the city, either by direct appropriation from the general funds, or by the issuance of the bonds of such city." The city of Topeka had accordingly issued bonds and had levied a tax to secure funds for paying off the bonds; it had then granted to an outside manufacturing company some of the bonds as an inducement to locate within the city. The validity of a loan and tax for this purpose having come into litigation, the case was appealed to the national Supreme Court. It was argued against the tax that the property of citizens was being taken from them to be given to a private company and that this was in reality

<sup>1</sup> Since we have already considered this subject, partly, in the Chapter on Federal Taxation and Finances, the present chapter is devoted chiefly to the *protections against illegal State taxes.*

not taxation at all but an abuse of the State's public powers. In support of the constitutionality of the tax it was urged that it had been levied in pursuance of the regular authority of the legislature and that the money had been properly used to encourage the manufacturing interests of the community. The Supreme Court held that there was a sharp distinction between levies for a public purpose and for a private one. A sum collected by government for the benefit of private individuals was not a tax but a taking of property. "A tax" says Webster's Dictionary, "is a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or State. Taxes are burdens or charges imposed by the legislature upon persons or property, to raise money for public purposes." In deciding whether a rate is for public or private purposes, courts must be governed mainly by the course and usage of the government. The objects for which taxes have been customarily levied were objects found necessary to the support and for the proper use of the government. Whatever pertains to this, and is sanctioned by time and the acquiescence of the people, may be considered a public use, but the Topeka tax, in favor of a manufacturer who was to locate his iron works in the city would open the door for a great host of applicants for subsidies from perhaps two-thirds of the business men in the community. It could not be considered a public purpose, and was therefore unconstitutional. This case establishes firmly the principle that a public object must be served by State and local levies.

**Is the Purchase and Ownership of a Public Utility Industry a "Public Purpose"?**—This question was submitted to the Massachusetts Supreme Court by the legislature of that State—Opinion of the Justices, 150 Mass. 592; 1890—the fund being for the purchase of plants to manufacture and distribute gas and electricity. The Justices answered that if the legislature wished to allow taxation and loans for the common convenience and welfare of the inhabitants by giving the municipalities the power of purchasing, owning and operating their own gas and electric plants, such purpose was to be considered a public one, and therefore, the tax would be constitutional. Later the same question arose in reference to a legislative bill, authorizing cities to buy and sell coal and wood for fuel to their inhabitants. Here the Justices were of the opinion that the particular industries mentioned were not sufficiently public to render this a public purpose. They considered the use of tax funds to this end unconstitutional.<sup>1</sup> We must observe, however, that an industry may by its surrounding conditions, slowly pass from a private to a public nature. In certain circumstances the coal business ceases to be one of private concern, and interests the entire public to such an extent that a strike in the industry must be

<sup>1</sup>The courts of other States however have upheld taxes for the establishment of local fuel-yards.

settled in order to protect the public against serious, irreparable losses. In the same way the use of public funds to acquire and operate an industry may at one time be unconstitutional because the business is not a public one, while at a later period such purchase and operation may well be thought to be of such great common advantage as to make the purchase a public purpose and therefore constitutional. The organization and control of many of our greatest industries has so rapidly changed in the last few decades as to require us to change accordingly our public law governing such industries. Railways may legally receive State aid.

A long series of decisions has upheld such a system because it is for a public purpose. The whole public has such a direct interest in the means of transport and the circulation of business in general that the benefits of such a system accrue largely to the entire community. So far as the Federal Constitution is concerned, the 5th and 14th Amendments liberally construed would allow either Congress or the States to use the proceeds of taxation in this way for the encouragement of an industry such as railroading, which is distinctively a public service business. Despite this interpretation of the Federal Constitution, however, the State constitutions forbid the *pledging of the State's credit* for this purpose because of the unfortunate influence which such laws have upon the State legislature.

**State Taxes on U. S. Bonds and on Parts of the Federal Government.**—We have already seen that a State must not tax the various means used by the National Government in carrying out its powers, because such a tax would be an interference with the power of the Federal Government. This was first decided in *McCulloch v. Maryland*, 4 Wheaton, 316; 1819. Among the important results of this ruling is the exemption of Federal bonds from State taxes. In the case of *Weston v. Charleston*, 2 Peters, 449; 1829, the city had levied a tax on many kinds of personal property, including the 6% bonds of the United States, and the tax was collected from all residents of Charleston owning such property. Weston owned several national bonds and he paid the tax under protest, afterward suing the city to recover the amount paid. His suit being appealed, the Supreme Court decided in his favor, holding that (1) the Constitution, Article I, section 8, gives to Congress the power "to borrow money on the credit of the United States;" (2) the borrowing power is usually exerted by selling government bonds to the people; the money from the sale of these bonds forms a loan to the government; (3) a tax by a State, or by its agent, a city, upon these bonds would reduce their value, make them less desirable investments and interfere with their sale, thereby also *interfering with the borrowing power of the Government*. Accordingly the State tax was declared unconstitutional. Since the same principle would apply to any State taxes on national bank stock and national bank notes, *and since the National Government does not wish to deprive the*

States of their tax revenue from these sources, Congress has provided by Act of 1894 that the States may tax, as money on hand or on deposit, the national bank notes belonging to private individuals, and that they also may tax as personal property the shares of national bank stock (Act of 1864) owned by persons within the State, provided this taxation is at the same rate as on other similar classes of personal property, and provided that each State taxes only its own residents on this property.

**Can one State tax the bonds of another?**—The only portion of the Constitution which seems applicable is Section 1, Article 4, providing that full faith and credit shall be given in each State to the public acts of every other State. In *Bonaparte v. The Tax Court*, 104 U. S. 592; 1882, Maryland had included in the tax list of a resident the bonds of certain other States and cities, owned by him, some of which had been exempted from taxation by the States issuing them. The question was raised,—does not the “full faith and credit” clause<sup>1</sup> require Maryland to exempt from taxation the bonds or loans and obligations of its sister States, owned by residents of Maryland? The Supreme Court held that the Maryland tax on State bonds was constitutional, because the other States in issuing their bonds or in exercising any of their other powers could only use their authority within their own boundaries. If they chose to borrow money by floating bonds which were purchased by residents of Maryland, they could not extend their authority beyond the limits of their own territory, nor dictate to Maryland what she should tax and what she might not. If they could do so then every State might interfere with the internal affairs of every other State, which was unthinkable. Such an interference was never intended by the “full faith and credit clause” of Article 4. That clause aimed simply to secure and protect the validity of State public acts, records and proceedings, when called in question in other States. The result of this interpretation is that each State has full liberty to tax the securities of its sister commonwealths which belong to its own residents.

**A State Tax on its Own Bonds owned by Non-residents.**—Can one State tax the residents of other States upon their ownership of its bonds? In *Murray v. Charleston*, 15 Wallace, 300, the city of Charleston having issued bonds, later levied a tax on personal property and sought to collect this tax from those who held its own bonds. The tax was not disputed so far as it applied to all personal property within the city, including in such personal property the city bonds owned by its residents, but as applied to persons outside the State, the issue was doubtful. The city had instructed its Treasurer, in paying the interest on the bonds, to deduct 5% of the interest in payment of the tax, and this deduction was protested by the bond-holders resident outside the State. The Supreme Court

<sup>1</sup> Article 4, Section 1: Full faith and credit shall be given in each State to the public acts, records and proceedings of every other State.

decided that such a deduction was in substance a violation of the contract which the city had made with its creditors, when it issued the loan. Having agreed to pay them 6% interest the city, by deducting a portion of the interest, was in substance scaling down its interest rates, and thereby breaking its agreement to pay the higher rate. This was a violation of Section 10, of Article 1, of the Constitution, which provides that no State shall make any law violating the obligation of contracts,—hence, the tax as levied on outside bondholders was unconstitutional.

**State Taxation of National Trade.**—The protection of national commerce from State levies and interference was one of the main reasons why the commercial interests of the country favored the adoption of the Constitution in 1787. This simple, uniform, national control of trade, and exemption from local burdens, has been a strong feature of the constitutional protection of business. The general rule, as we have already seen, is that *the State may not tax interstate trade*, because it would interfere with the Federal power to regulate commerce. This simple principle is at times difficult to apply, because of the many complex questions which constantly crop up in business between different sections of the country. For example, when has an interstate shipment of goods legally commenced, so that State taxation may not be levied? In *Coe v. Errol*, 116 U. S. 517; 1886, this interesting problem arose as to a shipment of logs which had been placed in the river by Coe at the town of Errol. Other logs belonging to him had floated down from another State, and both lots were frozen in the river waiting for the spring freshets to carry them down the stream into another State. The town had levied a tax on logs within its territory; Coe claimed that his property was exempt, in that it was destined for interstate commerce. The case coming to the Supreme Court it was held that *after the logs had started* on their journey they were exempt from local taxes; accordingly such logs as had come down the river from another State and were held by the ice, were to be regarded as still in process of interstate shipment and could not be taxed by the town, but that those logs which had simply been assembled at the town by Coe and the real shipment of which had not yet actually commenced, could not be exempted from taxation.

**State Taxes on "Original Packages."**—Can a State tax goods arriving from other States while they are still in the original package? The main principles which govern this constantly recurring question have been decided in the following brief series of decisions: In *Woodruff v. Parham*, 8 Wallace, 123; 1867, the city had levied a general tax on merchants and auctioneers, which was collected from Woodruff, an auctioneer who had sold only goods shipped from other States and had offered them for sale in the original package. The amount of the tax was fixed according to the amount of sales, and Woodruff protested against the levy on the ground that it was a *tax on interstate commerce* and as such was (a) an interference by



the State with the congressional power over commerce and (b) that Section 10, Article 1, forbade the States to levy "duties on imports or exports." The Supreme Court, however, deciding against the auctioneer, upheld the city tax and ruled that (a) the tax was not aimed at interstate commerce, nor did it fall peculiarly upon such commerce but rather upon the *proceeds of the sale*, that after goods shipped from one State to another were offered for sale *they had mingled with the property in the State* and in doing so became subject to State taxation, and (b) the expression "duties on imports and exports" in Section 10 of Article I, did not refer to trade between the States but to foreign trade only, since an "import" or "export" in the sense of the Constitution was a shipment from or to a foreign country. A tax on goods which had come from one State to another was not a tax on "imports." This ruling has since been followed in all the subsequent decisions.

The second step was taken by the Supreme Court in *Brown v. Houston*, 114 U. S. 622; 1885, where a barge of coal had been shipped down the river to New Orleans, tied up to the dock and a placard immediately placed upon it "for sale." The coal being taxed before any of it was sold and while the barge was still at the dock, the owner protested the payment of the tax, on the ground that the levy was made while the goods were still in the original container and while they had not yet been mingled with the other commerce of the State. Hence, he claimed, the levy was unconstitutional because it interfered with interstate commerce. To this the Supreme Court answered that when goods were offered for sale after having come to rest within the State they formed part of the wealth in the State and that such wealth was taxable by the State government. Undoubtedly the State could tax all the property within its boundaries regardless of whether that property had previously been in interstate commerce or not, and the exact time when it could levy such a tax was when the products which had so circulated in interstate commerce, "came to rest," or reached their owners within the State. As evidence that the coal had so come to rest within the commonwealth, the fact that it was offered for sale was conclusive. The State tax was therefore constitutional, being a tax not upon interstate trade but upon wealth within the State. This tax case marks an important divergence from the rule concerning State *regulation* as distinct from State *taxation* of interstate trade. The general rule on regulation is that the State may not regulate the first sale in the original package. An interesting variation of the principle is seen in the last case governing this point—the *American Steel and Wire Company v. Speed*, 192 U. S. 500; 1904. Here the State of Tennessee had levied a merchants' tax upon persons engaged in trade. The Steel Company in Illinois manufactured wire nails and fences, and shipped large quantities of goods to Memphis, Tennessee, at which point they were taken in charge by the Patterson Transfer Company, placed in storage

warehouses and there held in the original packages while the sales agents of the Steel Company solicited orders for the products. The amount of unsold stock on hand in storage varied from \$30,000 to \$100,000, according to the season. When orders were received by the Steel Company in Illinois for the Memphis district they were turned over to the transfer company at Memphis and the latter then shipped the goods to the purchasers. The Steel Company, having been taxed by Tennessee upon its goods in storage, protested that the storage of the goods in Memphis was only a temporary halt in their interstate journey and that the tax was therefore a State tax upon interstate commerce and as such, unconstitutional. The Supreme Court found that the State tax was constitutional because the goods were *held for an indefinite time awaiting sale*, and that during this time they were a part of the wealth within the State and subject to its taxation. The fact that they had been shipped from Illinois to Memphis and that they might later be shipped out of the State to other surrounding districts was not sufficient proof that they were destined or consigned to interstate commerce while in storage in the city. A State might tax all of the wealth which had "come to rest" within its boundaries even though such wealth might later by subsequent sale, be transferred outside the State.

**State Taxes on Wheat Shipments.**—For many years it has been the practice of the railways to allow shippers of certain kinds of freight, such as grain, to store their goods at some central point in an elevator or warehouse and reship them later to their final destination. The immense volumes of wheat that flow from the Northwestern fields to the collecting points, for shipment Eastward over the Lakes and the railways, are sold half a dozen times while on their way; they are stopped at Duluth, Superior, and countless other points and graded, stored in elevators, even ground into flour and shipped again. Often the shipments are consigned in blank or sent to an Eastern commission merchant with the express purpose of selling them while in transit. At each one of these points the possibility of State taxation offers a practical question of much importance to the shipper. In *Bacon v. Illinois*, 227 U. S. 504; 1913, a series of grain shipments in transit had been bought by Bacon. They were all consigned to Eastern ports and were all given the usual privilege of stopping at Chicago to be inspected, graded, sold and reshipped or withdrawn. Bacon availed himself of this provision, *placed them in his own private elevator at Chicago* where they were graded, and then shipped on to their original destination on the Atlantic seaboard. While in his private elevator they were taxed as personal property under the Illinois law, and to recover payment Bacon brought suit on the ground that the shipments were still in interstate commerce and therefore exempt from State taxation. The United States Supreme Court, however, upheld the State tax and in an opinion by Justice

Hughes ruled that the grain while in the elevator was not strictly in course of transportation,—it might, under the shipping contract, be either sold or offered for sale or withdrawn from shipment or continued in transportation:—and with all these alternatives before him the owner was able to dispose of his property with unrestricted freedom. Regardless of the use which was ultimately made of the property, the Court held, while it was in the owner's storage house awaiting his decision, it was undeniably a part of the wealth within the State and a State tax on such property was clearly not an interference with national commerce and was accordingly constitutional. This decision like many others in the same field is a direct increase in the State's power to levy taxes that may prove a burden on national trade.

**Can a State Exempt its own Products from its Taxes?**—An interesting form of State discrimination against national commerce is seen in *Darnell Company v. Memphis*, 208 U. S. 113; 1906. Here the State of Tennessee had levied a general tax on manufactured goods, but exempted those manufactured from the products of the soil of Tennessee. The effect of such a law would clearly be to discourage interstate commerce, even though the tax were levied after the products were no longer in national trade, but had become a part of the general wealth within the State. For by such a discrimination the State could so heavily burden the products of other States through taxation, that interstate trade would in effect be stopped. The Darnell Lumber Company was taxed under the law, on some \$19,000 worth of logs in its yards, which it had purchased in other States; it brought suit to recover the tax on the ground that the State must not discriminate against the products of other States. Upon the suit coming to the Federal Supreme Court it was held that the company's contention was correct and the State tax law unconstitutional. The Court ruled that since the power to regulate interstate trade belonged to Congress, any attempt by a State, through a tax or otherwise, to discourage or *discriminate against trade from other commonwealths* was in substance a regulation of interstate commerce and was void. It could make no difference whether the tax was imposed when the goods first entered the State or after they had been within it for some time and had been manufactured into finished products of a different form,—the State must not attempt to trace them back to their origin and lay a heavier tax upon them than upon the products of its own soil, since such a tax must certainly operate as a burden upon interstate trade and thereby violate the plain intent of the Constitution.

**Drummers.**—Are travelling salesmen subject to taxation as they pass from State to State securing orders, or can they claim to be exempt under the interstate commerce clause? This question reached the Supreme Court in *Robbins v. The Shelby County Taxing District*, 120 U. S. 489; 1887. Robbins was a travelling salesman for a Cincinnati firm; he was soliciting orders in Memphis, Tenn.,

and carried his samples with him. A statute of Tennessee provided that drummers and all persons who did not have a regular house of business in the taxing district, if they offered goods for sale by sample, should pay to the county a license tax of \$10.00 per week or \$25.00 per month. Robbins was prosecuted for failure to pay the tax, and his appeal was taken to the Supreme Court on the ground that he was engaged in interstate trade, as a representative of a house in another State, and that he therefore could not be interfered with by State taxation of the kind described. The Court held that such a tax was unconstitutional, as an interference with interstate commerce, and its reasoning in this case has been followed in a number of other decisions and is worthy of special notice. Can the people of one State, it asks, prevent those of another from sending in goods by the ordinary channels of interstate trade? Would not such a restriction affect the very foundation of trade? An outside manufacturer cannot sell his goods in the State without having in some way obtained orders therefor. He must not be compelled to send them at a venture without knowing whether there is a demand for them, nor must he be obliged to limit himself to the use of the mails to secure orders.

The truth is, that, in numberless instances, the most feasible, if not the only practicable, way for the merchant or manufacturer to obtain orders in other States is to obtain them by personal application, either himself, or by some one employed by him for that purpose; and in many branches of business he must necessarily exhibit samples for the purpose of determining the kind and quality of goods he proposes to sell, or which the other party desires to purchase.

Since the Tennessee tax interfered with this undoubted right of the citizens of other States to take orders for goods in Tennessee, it was a hindrance and obstruction of interstate commerce, and an interference with the power of Congress over such trade, and accordingly unconstitutional.

**Can an Interstate Salesman's Local Construction Work be Taxed?**—An interesting counterpart is offered in *E. A. Browning v. The City of Waycross*, 233 U. S. 16; 1914. Here the city authorities of Waycross, Georgia, had levied an annual tax of \$25.00 upon lightning rod agents or dealers engaged in *putting up* lightning rods within the corporate limits of the city. Browning was the agent of a St. Louis corporation on whose behalf he had solicited orders for the sale of lightning rods; he had received the rods when shipped from St. Louis and had erected them for the customers. In fact, the contract of sale of the rods from St. Louis, Missouri, to Waycross, Georgia, which was admittedly interstate commerce, included an agreement to erect the rods on the buyer's property. Browning, having failed to take out a license, was arrested and fined. He appealed to the Federal Supreme Court on *the ground that the tax was a State levy upon interstate commerce*

and therefore unconstitutional. The Court held that the city had the authority to levy such a tax, which was not a levy upon trade between the States but upon local business transacted by the agent after the interstate sale had been completed. The business of erecting the rods had nothing whatever to do with interstate trade and could not be made a part of such trade by agreement between the buyer and seller, but was purely local in its nature and therefore subject to State or city taxation.<sup>1</sup>

Chief Justice White who delivered the opinion, makes the principle doubly clear by adding that the Court sharply distinguishes between the agreement covering interstate trade on the one hand and local construction work on the other, but this would in no way prevent the Court from ruling that the whole transaction was interstate commerce "in a case where, because of some intrinsic and peculiar quality or inherent complexity of the article, the making of such agreement was essential to the accomplishment of the interstate transaction."

**C. O. D. Sales.**—Where an object is purchased in one State to be shipped to another and paid for C. O. D. a State tax may not be levied upon drummers engaged in making these sales. In *Norfolk Company v. Sims*, 191 U. S. 441; 1903, a license tax on persons making such sales in North Carolina was declared unconstitutional. And where an agent in North Carolina solicited orders for a product, transmitted these orders to his manufacturing concern in another State and then received the articles from his employer and himself distributed them to the customers who had given him the order, it was held that the shipment from the outside, although in two parts, viz., from the manufacturer to the salesman and from the salesman to the customer, was yet in substance one continuous interstate shipment and was therefore not subject to a State tax

<sup>1</sup> "We are of the opinion that the court below was right in holding that the business of erecting lightning rods under the circumstances disclosed was within the regulating power of the State, and not the subject of interstate commerce, for the following reasons: (a) Because the affixing of lightning rods to houses was the carrying on of a business of a strictly local character, peculiarly within the exclusive control of State authority; (b) Because, besides, such business was wholly separate from interstate commerce, involved no question of the delivery of property shipped in interstate commerce, or of the right to complete an interstate commerce transaction, but concerned merely the doing of a local act after interstate commerce had completely terminated. It is true that it was shown that the contract under which the rods were shipped bound the seller, at his own expense, to attach the rods to the houses of the persons who ordered rods, but it was not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to State control, into an interstate commerce business, protected by the commerce clause. It is manifest that if the right here asserted were recognized, or the power to accomplish by contract what is here claimed were to be upheld, all lines of demarcation between national and State authority would become obliterated, since it would necessarily follow that every kind or form of material shipped from one State to the other, and intended to be used after delivery in the construction of buildings or in the making of improvements in any form, would or could be made interstate commerce."

until the goods reached the purchaser. *Caldwell v. North Carolina*, 187 U. S. 622; 1901.

**Brokers and Peddlers.**—On the other hand, peddlers are in a different list from drummers. The peddler may bring all of his goods with him from another State, but he invariably sells them, not as an interstate order but as single local sales. A license tax may therefore be imposed upon peddlers so long as it applies to all peddlers in a given class, and does not discriminate against those who sell articles produced in other States.

And where a broker receives and executes orders for the sale of goods on future delivery, notably grain and other products, the sale and delivery to take place within the same State, he cannot be said to be engaged in interstate commerce, because of the fact that some of his customers are resident in other States, and send him the orders from other States. The contract of sale is here made and executed in the State in which the broker's office is located. *Ware v. Mobile*, 209 U. S. 405; 1908. The rule here is substantially the same as in the insurance cases, notably *Paul v. Virginia*, 8 Wallace, 168; 1868.

**When are Sales Local?**—The extent and the limits of State power are well illustrated by the Alabama license tax on sewing machine sales agents, levied in 1911. This law imposed a fee of \$50 annually upon each person or corporation selling or delivering sewing machines, in each county in which they are sold or delivered, with an additional tax of \$25 in each county for each wagon or team used in delivering or displaying the goods. The tax did not apply to merchants selling machines at their regularly established places of business. An additional tax of one-half the above amounts was imposed by each county for county purposes. The Singer Sewing Machine Company protested the payment of the tax on the ground that it was an interference with interstate commerce and this protest led to a suit which was decided April 6, 1914, in the United States Supreme Court, *Singer Sewing Machine Company v. Brickell et al.*, the State Tax Commission of Alabama. The facts, which were agreed upon, were that the Singer machines were brought in from outside the State, were consigned to a central store in each county and there were loaded upon wagons which were driven through the rural sections in search of customers. They were also offered for rent. A customer being found, the machine was delivered to him on the spot and the final execution of the sale took place at the county store or place of business of the company. This the company claimed constituted a complete transaction in interstate commerce and, as such, was exempt from State taxation. But the Supreme Court held that no element of interstate trade was involved. "In each county there is a store or regular place of business, from which all of the local agents for the same county are supplied with sewing machines and appurtenances that are to be taken into the rural districts for sale or renting, and all trans-

actions that enter into the sale or renting are completely carried out within a single county." The company sold its machines in Russell County, Alabama, from a point in Georgia and these transactions were admittedly interstate commerce and, as such, were declared exempt from the State tax by the courts. No better illustration of the present limits of State taxation can be found than this case which brings out sharply the distinction between the peddler or local itinerant sales agent on the one hand, and the interstate trader on the other.

**State Taxes on Interstate Railways.**—This is probably the most difficult of all the questions of State taxation, so far as its constitutional aspects go. The few leading cases which we have to consider on this subject show clearly how great is the need for a general revision by Congress of the whole subject of interstate commerce and State taxation.

(a) Can a State tax a railway franchise granted by the United States?—In *California v. The Central Pacific*, 127 U. S. 1; 1888, the Federal Government had granted a franchise to the railway to engage in commerce between the States and under this franchise the company operated in California and Utah. California levied a tax upon railways, including their franchises, and sought to collect this tax from the Central Pacific which however protested on the ground that its permit to engage in interstate commerce came from the regulating power of Congress and that this Federal power could not be interfered with nor obstructed by a State tax. To this contention the Supreme Court gave its approval, ruling that the Federal commerce power was supreme and must not be interfered with by the States. If the States could require the payment of a tax upon a franchise granted by the Federal Government they could in substance nullify or lessen the grant made by Congress and thereby obstruct its powers and authority. Accordingly the State tax was unconstitutional.

In *LeLoup v. Mobile*, 127 U. S. 640; 1888, the city of Mobile had levied a license tax upon telegraph companies. LeLoup, the local agent of the Western Union, being assessed \$225 for this license, protested the payment on the ground that his company was engaged in interstate commerce under the National Telegraph Act of 1866, and was therefore exempt from State taxation on its interstate franchise. Here again the Supreme Court upheld the company's contention, declaring that Federal commerce, of which the telegraph formed a part, must not be licensed by a State since it was under the regulation of the National Government, according to Section 8 of Article I.

Again in *McCall v. California*, 136 U. S. 104; 1890, the ruling was made stronger. McCall was the San Francisco agent of the New York and Lake Erie Railway. His work was to solicit passenger traffic eastbound over the railway's interstate line. The State having levied a license tax on all railway agents, McCall was asked to

pay \$25 license as an agent. He claimed exemption on the ground that his company was engaged in interstate commerce and that being employed to secure interstate traffic he could not be required to pay a license to any State for the permission to do so. The Supreme Court upheld this view on the same ground, viz., the protection of interstate commerce carriers against interference by the State government.

(b) Can a State tax the general property, roadbed, real estate, etc., of an interstate line? In *Thompson v. Union Pacific*, 9 Wallace, 579; 1869, a State tax was laid on the physical property of such an interstate carrier. The company claimed exemption from the tax on the ground that it was an interstate railroad, and the Supreme Court answered that the State tax was constitutional when levied upon the *physical property* of all railways both State and interstate, within the Commonwealth. That is, if no discrimination against interstate carriers was made, the State could tax the physical property of all railways in common, so long as it did not tax their franchises received from the Federal Government. Here is a clear statement of the same rule which we have already considered, viz., that the State may tax property within its borders so long as that property is not a Federal gift or franchise.

In *Union Pacific v. Peniston*, 18 Wallace, 5; 1873, the question arose, Can a State tax the general property of an interstate railway, when the company has been chartered by the Federal Government? The Union Pacific R. R. Co., chartered by Congress, had on its Board of Directors two government appointees, received grants of land from the Federal Government, enjoyed a loan from the United States, and was obliged by the government to keep its railroad and telegraph lines in repair and use, to transmit dispatches and transfer Federal mails, troops and munitions of war. The county authorities of Nebraska having levied a tax upon real and personal property of railways within their district, the company claimed exemption under the above conditions, and declared that the State tax upon this property would be an interference with the railway's powers as an agent of the Federal Government. The Supreme Court in ruling upon the case in 1873, distinguished between a tax on the *property* of an interstate railway and a tax on its *operations*, declaring that a general property tax by the State would not be an interference, while a tax on operations might conceivably be so levied as to interfere. The State tax was therefore declared constitutional, since it did not discriminate against interstate railroads but was levied similarly upon other corporations within the State. Said the Court,—“The exemption of agencies of the Federal Government from taxation by the States is dependent, not upon the nature of the agents, nor upon the mode of their constitution, nor upon the fact that they are agents, but upon the *effect* of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it.”



or hinder the efficient exercise of their power. A tax upon their property merely, having no such necessary effect, and leaving them free to discharge the duties they have undertaken to perform, may be rightfully laid by the States. A tax upon their operations, being a direct obstruction to the exercise of Federal powers, may not be."

(c) We next come to the problem, to what extent can a State tax the actual business of interstate commerce which is going on within its boundaries, in the receipts of common carriers or their rolling stock, their capital stock and other property. In *Pullman Company v. Pa.*, 141 U. S. 18; 1891, the State had attempted to tax the capital stock, measuring the tax by the miles covered by the company's cars circulating in and through the State. The company claimed that such a tax, levied as it was upon the very means and instrumentalities of interstate commerce circulating constantly in such trade between the States, was clearly unconstitutional as a State interference and usurpation of the Congressional authority. It was claimed that since the State could not tax the Federal franchise or the permit of an interstate company to engage in trade as a carrier, it certainly could not tax the moving property of the company travelling from one State to another in the pursuit of its business. The Pennsylvania tax was levied according to what is known as the rule of "average habitual use," that is, the total mileage travelled by the cars was measured and it was ascertained what fraction or proportion of this total mileage lay within the State of Pennsylvania and the tax was then adjusted to this proportion. The Supreme Court upheld the State tax declaring it to be constitutional, on the ground that it was not aimed as a discrimination against interstate commerce but was levied upon all railway rolling stock within the State. The latter had full authority to tax all personal property within its jurisdiction and in doing so it might include such personal property as was engaged in interstate commerce along with other personal property. So long as it followed the rule of proportion of mileage or average habitual use of the cars within the State, it was not taxing such personal property more than its proper share and if all the other States were to adopt the rule chosen by Pennsylvania such interstate cars would be in no danger of double taxation or of interference in a discriminatory sense. Accordingly the tax was a proper exercise of the State's power and was constitutional.

(d) **The Unit Rule.**—Although a State may not require an interstate carrier to pay a license fee for the privileges of interstate commerce, the States have yet evaded the spirit of this rule by laying taxes on interstate carriers, according to their rolling stock, as we have seen, and according to their real and personal property in the State and have even taxed a part at least of their franchises and the general value of their business. In levying these "general value" taxes, the principle usually followed is that of the Unit Rule. That

is the

erty of the company, both within and without the

State, is appraised, or the entire capital stock is calculated, or the entire "value" of the company, over its whole system, is calculated, and a proportion of this is taxed equal to the proportion which lies within the State's limits. By this rule, the State is enabled to secure a much higher assessment of the value of the property than if it measured only the real estate and personalty actually located within its limits, because a railway's market value is much more than its real estate and rolling stock. It has an additional value that comes from its business connections, its ability to transport persons and goods to many States. Accordingly if we wish to find the actual value of that part of the railway which lies within any State we must calculate not only its real estate and movable property but we must also find the State's share of this additional value of the entire railway. That is, we must regard the company's system as a whole or a unit. For example—in *C. C. C. and St. L. Railway v. Backus*, 154 U. S. 439; 1894, the Indiana law had provided that the State Tax Board, in measuring the value of a railway for taxation purposes, should appraise its entire system, and should tax that proportion of this value which was represented by the proportion of the total mileage of the railway that lay within the State. If the railway had two-thirds of its mileage within the State, two-thirds of its entire value should be taxed. The railway objected to the appraisal of its total system, contending that this was a tax on its interstate commerce business, and was, therefore, an interference with the Congressional power to regulate commerce, and, hence, unconstitutional. But the Supreme Court ruled that the State was not interfering with the interstate business of the railway, since it did not tax any larger part of the railway's business than could fairly be said to be located within the State, and which accordingly formed a part of the wealth of the State. If the State did not reach outside its own jurisdiction, and interfere with commerce in other States, but confined its taxing power to its own just proportion of the railway's business, as represented by its proportion of the railway's mileage or by some other equitable method of measuring its proportion, the State was using its taxing power in a constitutional way.

"The true value of a line of railroad is something more than an aggregation of the values of separate parts of it, operated separately. It is the aggregate of those values plus that arising from a connected operation of the whole, and each part of the road contributes not merely the value arising from its independent operation, but its mileage proportion of that flowing from a continuous and connected operation of the whole. This is no denial of the mathematical proposition that the whole is equal to the sum of all its parts, because there is a value created by and resulting from the combined operation of all its parts as one continuous line. This is something which does not exist, and cannot exist, until the combination is formed. A notable illustration of this was in the New York Central

Railroad consolidation. Many years ago the distance between Albany and Buffalo was occupied by three or four companies, each operating its own line of road, and together connecting the two cities. The several companies were united and formed the New York Central Railroad Co., which became the owner of the entire line between Albany and Buffalo, and operated it as a single road. Immediately upon the consolidation of these companies, and the operation of the property as a single, connected line of railroad between Albany and Buffalo, the value of the property was recognized in the market as largely in excess of the aggregate of the values of the separate properties. It is unnecessary to enter into any inquiry as to the causes of this. It is enough to notice the fact. Now, when a road runs into two States each State is entitled to consider as within its territorial jurisdiction and subject to the burdens of its taxes what may perhaps not inaccurately be described as the proportionate share of the value flowing from the operation of the entire mileage as a single continuous road. It is not bound to enter upon a disintegration of values and attempt to extract from the total value of the entire property that which would exist if the miles of road within the State were operated separately."

(e) A more striking instance of the Unit Rule is seen in the *Adams Express Company v. Ohio*, 165 U. S. 194; 1897. Here Ohio had taxed the express company, measuring its tax not according to the real estate or personal property of the company located within the State, but appraising rather the entire value of the company's business throughout the United States, and levying its tax on that proportion of this whole value, which was measured by the proportion of its mileage within the State of Ohio. The company, in protesting against this application of the Unit Rule, declared that the State should tax only the company's horses, wagons, harness, stables, real estate, pouches, baskets and other property located within the State. But the Supreme Court again upheld the Unit Rule, and decided (1), that the physical property of the company—that is its visible, tangible property—formed only a part of its total assets and value for taxing purposes (\$42,000 worth of express company property in Ohio produced earnings of \$282,000 in 1895); (2) that the State had a right constitutionally to tax its due proportion of this total value, and (3) that this proportion could properly be measured by ascertaining the total mileage of the company's business and the part of this mileage which lay within the State. It is noticeable that both in this and the preceding case the Court ruled that the company's financial value arose largely from its business as a whole, including its ability to transmit goods from one point in the country to others in distant States; that is, that a State could tax its share of the company's wealth and value and that part of this value came from its connections with offices in other States, in short from *interstate business*. Such is now the accepted rule of State taxation; **yet, it must be remembered that the effect of this rule, while favorable**

to the State treasury, is to permit the State taxation of interstate trade. The State's interference both in the regulation of rates and in taxation is already a serious hindrance in railways and other enterprises. A complete revision of the State taxing system is needed, in order to prevent this important power from being used for the very purpose which it was the design of the Constitution to prevent—viz., to interfere with interstate commerce. The decisions above described have had the dangerous effect of defeating this very aim. We need a complete freedom from State taxation for all interstate property of common carriers, and a uniform system of taxation levied on such property by the national authorities.

(f) **State Taxes on Gross Receipts.**—Undoubtedly the Supreme Court at times sees the need for a more pronounced national view of national commerce, as in its decision in *Galveston Railway v. Texas*, 210 U. S. 217; 1908. This case limits the State's power within reasonable bounds and frees national commerce from undue interference by local taxation. The State of Texas had imposed upon railways an occupation tax equal to 1% of the gross receipts. If the railway lay partly within and partly without the State, the tax was to be equal to such proportion of the 1% as the length of the line within the State bore to its entire length. The Galveston Company lay wholly within the State but connected with interstate lines, and a large part of its revenue was derived from interstate commerce. The tax was protested by the corporation, and the case going to the United States Supreme Court, the law was declared unconstitutional on the ground that it was an effort to reach the *gross receipts* from both intra and *interstate* commerce. As such its effect was to interfere with the free passage of the latter commerce, which interference was violative of the Congressional authority. The State made a strong defence, claiming that it was not attempting to tax the company's gross receipts from either intra or interstate traffic but was using them as a measure of the value of the property per mile. Such a use of gross receipts as a measure of property value had been permitted by the Supreme Court forty years ago in *Maine v. The Grand Trunk Railway*, 142 U. S. 217, and the State relied upon this precedent. But the Court held that unless the whole plan of taxation presented in the law showed clearly that the State was aiming only to use the receipts *as a measure* of the value of the company's property in the State, then the inference must be drawn that the legislature was really taxing those receipts and this was unconstitutional so far as interstate traffic was concerned. Unfortunately for the State's claim, it had also levied other taxes on the property of the company, so that the new tax was really an additional burden which could not be justified as a tax on property but must be regarded as a levy on the receipts, and as such, an unconstitutional interference with interstate trade.

**State Taxes on Total Capital Stock.**—While the Court was *closely divided* in the Galveston case, it showed the same determina-

tion to protect interstate business in the later decisions in *Western Union Company v. Kansas*, 216 U. S. 1; 1909; and *Pullman Co. v. Kansas*, 216 U. S. 56; 1909. Here Kansas had attempted to tax all the foreign corporations in her boundaries, even though engaged in interstate commerce, a certain percentage of their *entire capital stock*, as a permit tax for the privilege of transacting intrastate business within her boundaries. The Western Union and the Pullman companies refused to pay the levy and the State sought to oust them from the further transaction of local business. On this question the Supreme Court again divided, but the majority held that a tax upon the entire capital stock was a burden upon all the business of the company, both State and interstate, and upon all its property interests, both within and without the commonwealth. The tax, therefore, was a levy both upon interstate commerce, and upon property lying outside the jurisdiction of Kansas, and as such was unconstitutional. The Court admitted that Kansas could require an interstate corporation to pay a reasonable license tax for the privilege of doing *local* business within the State but it is altogether a different thing for Kansas to deny it the privilege of doing such local business beneficial to the public, excepting on condition that it shall first pay a given percentage of all its property wherever situated, and of its business in and out of the State.

Applying these principles to the Kansas tax, the Court held: "On the contrary, it is to be deduced from the adjudged cases that a corporation of one State, authorized by its charter to engage in lawful commerce among the States, may not be prevented by another State from coming into its limits for all the legitimate purposes of such commerce. It may go into the State without obtaining a license from it for the purposes of its interstate business, and without liability to taxation there, *on account of such business*."

"But it is said that none of the authorities cited are pertinent to the present case, because the State expressly disclaims any purpose by the statute in question to obstruct or embarrass interstate commerce, but seeks only to prevent the Telegraph Company from entering the field of domestic business in Kansas without its consent and without conforming to the requirements of its statute. But the disavowal by the State of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted."

"Looking, then, at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the making of the payment by the Telegraph Co., as charter fee, of a given percent of its *authorized capital*, representing, as that capital clearly does,

*all* of its business and property, both within and *outside of the State*, a *condition* of its right to do local business in Kansas, is, in its essence, not simply a tax for the privilege of doing local business in the State, but a burden and tax on the company's interstate business and on its property located or used outside of the State." Mr. Justice White added, "Moreover, to me it seems that where the right to do an interstate business exists, without regard to the assent of the State, a State law which arbitrarily forbids a corporation from carrying on with its interstate commerce business the local business, would be a direct burden upon interstate commerce."

**Gross Receipts as a "Measure of Value."**—For a time it appeared that the Supreme Court would follow these decisions and guard the interstate carriers more adequately against interference with their business in the form of State taxes on their capital stock or receipts from interstate commerce. But in 1912 the fluctuating majority in the Court turned once more in favor of State taxation. In *U. S. Express Co. v. Minnesota*, 223 U. S. 335; 1912, the State had levied a tax of 6% on the gross receipts in the State, from all sources including both intra and interstate business; this was *in lieu of all other taxes* on personal and real property. The express company protested on the ground that such a levy was a burden on the interstate business of the company and was to that extent unconstitutional as an interference with the powers of Congress. The company cited the decision already mentioned in *Galveston Ry. v. Texas*. But the Supreme Court held that there was a distinction between tax laws *burdening* interstate commerce and those *measuring* the tax to be paid by the income from all sources, including even that from interstate business. The latter were constitutional if the receipts or income were taken as a real measure of the value of the property in the State and if the tax were in lieu of other taxes. Speaking of the *Galveston* and *Western Union* decisions just mentioned, the Court said:

"While we have no disposition to detract from the authority of these decisions, this court has had also to consider and determine the effect of statutes which undertake to measure a tax within the legitimate power of the State by receipts which came in part from business of an interstate character. In that class of cases a distinction was drawn between laws burdening interstate commerce, and laws where the measure of a legitimate tax consists in part of the avails or income from the conduct of such commerce.

"In *Wisconsin & Michigan Railway Co. v. Powers*, 191 U. S. 379; 1903, a tax was sustained which made the income of the railway company within the State, including interstate earnings, the *prima facie* measure of the value of the property within the State for the purpose of taxation. In the course of the opinion this court said (p. 387):

"In form the tax is a tax on the property and business of such railroad corporation operated within the State, computed upon

certain percentages of gross income. The prima facie measure of the plaintiff's gross income is substantially that which was approved in *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217; 1891.'

"A question, in principle, not unlike the one here presented, came before this court in *Flint v. Stone Tracy Co.*, 220 U. S. 107; 1911. In that case it was contended that the income of the corporations sought to be taxed under the Federal law, included, as to some of the companies, large investments in municipal bonds and other securities beyond the Federal power of taxation. It was held, after a review of some of the previous cases in this court, that, where the tax was within the legitimate authority of the Federal Government, it might be measured, in part, by the income from property not in itself taxable, and the distinction was undertaken to be pointed out between an attempt to tax property beyond the reach of the taxing power and to measure a legitimate tax by income derived, in part at least, from the use of such property. *Flint v. Stone Tracy Company*, supra, 162, 3, 4 and 5.

"The right of the State to tax property, although it is used in interstate commerce, is thoroughly well settled. *Postal Telegraph Company v. Adams*, 155 U. S. 688; 1895; *Pullman's Palace Car Company v. Pennsylvania*, 141 U. S. 18; 1891; *Ficklen v. Shelby County*, 145 U. S. 1, 22; 1892. The difficulty has been, and is, to distinguish between legitimate attempts to exert the taxing power of the State, and those laws which, though in the guise of taxation, impose real burdens upon interstate commerce as such. . . ." Further the Court said, quoting from *Postal Telegraph Company v. Adams*, 155 U. S. 697:

"Doubtless, no State could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce; but the value of property results from the use to which it is put and varies with the profitability of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution.' We think the tax here in question comes within this principle." The effect of these rulings is to confirm the State's power to levy taxes even on the local receipts derived from interstate commerce.

**State Taxes on other Interstate Companies.**—Can a State tax companies engaged in interstate trade, which are not common carriers? Here the laxity and diversity of our State corporation laws have led to a most dangerous use of the taxing power. So long as every State is free to create or charter new corporations, which shall have power to engage in any business whatsoever, including interstate commerce, it is necessary for every other State to have the power to exclude such corporations from its boundaries if it

chooses. Each State must have the right to say whether the corporations created by its sister commonwealths shall be admitted to transact business within its own boundaries or not. If New Jersey, the mother of corporations, could send out a great host of companies under the loose charter laws which until recently existed in that State, then it behooved the other States to admit or to exclude from their boundaries the New Jersey corporations as they pleased, or to attach conditions to the admission of such corporations. So we have in American law the curious spectacle of one State chartering a corporation to transact business anywhere in the world while another State enjoys the power to exclude that corporation from its boundaries, and a third authority, the United States Government, may determine whether such corporation may engage in interstate commerce. The National Government has not yet exercised its powers, but unfortunately all the States have done so, and have prescribed the conditions upon which "foreign corporations" may enter and transact business—foreign corporations being those chartered by other States or by foreign countries. This doctrine, which is really necessary in order to protect each State from the laxity of the others has had serious consequences when applied to taxation. It has led to the rule that a State in imposing conditions for entrance, upon the foreign corporation, may make one of these conditions the payment of a license or franchise tax, and may even raise this tax above the amount paid by domestic companies.

In *Pembina Mining Company v. Pennsylvania*, 125 U. S. 181; 1888, the Mining Company, a Colorado corporation which was engaged in shipping its ores and products in interstate trade, wished to open a branch office in Philadelphia. In order to do so it was obliged to pay a license tax to the State of Pennsylvania. The company protested on the ground that it was an interstate commerce corporation and that Pennsylvania could not interfere with such commerce by a license tax. To this the Supreme Court responded that while Pennsylvania could not tax the shipment or transport of ores from another State, and the mining company could therefore remain outside the State and send its products into Pennsylvania without being subject to a tax on its interstate shipments, yet if the company wished to enter the State and open a general business office, then the State had control over all foreign corporations which wished to transact business within its boundaries and could require them to pay a license tax for the privilege of opening an office, if it chose. This dangerous doctrine was further extended in the *Horn Silver Mining Company v. New York*, 143 U. S. 305; 1892. Here the Mining Company was a Utah corporation engaged in mining and interstate traffic, and was required by the State of New York to pay a tax on its entire capital of \$10,000,000, the tax amounting to \$30,000 in all. The Mining Company protested, *claiming that it already had paid a tax in the State of its incorpora-*



tion, Utah, and another in Illinois, where much of its property was located, and that being an interstate company its operations must not be interfered with by a State tax. Again the Supreme Court upheld the tax, even though levied *upon the entire capital* of the corporation both within and outside the State of New York, holding that since the State had the right to exclude a foreign corporation entirely, it must also have the right to determine under what conditions it would admit such a corporation, and that one of these conditions might be the payment of a tax upon its whole capital wherever located. The possibilities of this surprising doctrine are again shown in an early non-commercial case—*The Philadelphia Fire Association v. New York*, 119 U. S. 110; 1886. Here New York had sought to secure some reciprocity in interstate corporate relations by providing that those companies chartered by States which allowed New York corporations to enter under favorable circumstances, that is, with light taxation, should be required to pay only a light tax when entering the State of New York; whereas those corporations which came from other States must pay a heavier tax when transacting business in New York. The effect of this law was to establish a higher rate of taxation for different companies doing exactly the same business within the State of New York. When this higher tax was sought to be levied upon the Philadelphia Fire Association, a Pennsylvania company, on the ground that Pennsylvania did not admit New York corporations under favorable circumstances, the Fire Association objected, claiming that New York was denying to it the equal protection of the law and was subjecting it to a heavier tax than was paid by other corporations. But the doctrine above described was applied and the State tax was declared constitutional by the Supreme Court on the ground that the State had the right to fix what conditions it chose when admitting a foreign corporation to transact business within its territory.

**Practical Difference Between Common Carriers or Transmitting Companies, and Other Concerns.**—From this brief survey we observe that the constitutional rule of State taxation on interstate business is now based on the following general principles:

(a) No State taxation of interstate commerce *as such* is valid:

(b) Practically all the property of interstate carriers, which is located within the State or may properly be assigned as the State's share of the total value, may be taxed;

(c) A common carrier or a concern whose business is the very *transmission* of interstate commerce itself, such as a railway or telegraph company, may enter a State without its consent, open an office and transact its interstate affairs without securing the permission of the State or paying any license fee for the privilege, because its right to engage in national trade does not come from the State but from Congress;

(d) But such interstate carriers may be required by the State

to pay a license fee for the privilege of conducting local intrastate business within its borders;

(e) Other companies which are not carriers or transmitters but are only engaged in interstate trade as an incident to manufacturing or producing, may ship their goods in from outside the State without its permission and without paying a license fee;

(f) But such companies before opening an office for the transaction of general business may be required to pay a tax not only on their business within the State but upon their entire property wherever located and upon their entire capital stock;

(g) And such license tax may be unequal and discriminatory, as between different classes of corporations according to their origin, varying according to the wish of the State.

The important difference mentioned in (c) above, between State taxes on common carriers whose business is the transmission of interstate commerce itself and taxes on companies engaged in manufacturing, mining, etc., and whose interstate trade is therefore only incidental, may readily be seen by contrasting the *Western Union v. Kansas*, 216 U. S. 1; 1909, already described, with the *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68; 1913, and the *S. S. White Dental Co. v. Massachusetts*, 231 U. S. 15; 1913. In these latter cases Massachusetts had imposed a tax on all foreign corporations except common carriers and those engaged in interstate commerce as a business. The tax was a license fee for the privilege of transacting business within the State and was one-fiftieth of one per cent of the total authorized capital stock; it was also provided that the maximum yearly tax should not exceed \$2,000 in any case. The *Baltic Mining Co.* was a Michigan mining corporation with its principal office in Boston. Its capital stock was \$2,500,000, but its total property and assets were \$10,700,000. It sold the out-put of its mines to the *United Metal Selling Co.*, a separate organization which distributed its products in interstate commerce. The *Baltic Company* transacted chiefly financial business in Massachusetts.

The *White Dental Co.* was a Pennsylvania corporation with capital stock of \$1,000,000 and assets of \$5,700,000. Its Boston office sold in both intra and interstate commerce. The tax on the *Baltic Co.* amounted to \$500; that on the *White Co.* to \$200. In both cases the Supreme Court upheld the tax on the ground that it was a lawful exercise of the State's power to admit or exclude outside corporations to its territory. "The right of a State to exclude a foreign corporation from its borders, so long as no principle of the Federal Constitution is violated in such exclusion, has been repeatedly recognized in the decisions of this court, and the right to prescribe conditions upon which a corporation of that character may continue to do business in the State, unless some contract right in favor of the corporation prevents, or some constitutional right is denied in the exclusion of such corporation, is but the correlative of the power to exclude."

By a recent amendment the Massachusetts tax has been raised, as might be expected; if a State can constitutionally tax property and business outside its borders why not derive an ever larger share of revenue from this source?

**The New Problem; Protection of National Trade.**—We need a complete revision of our tax laws which shall free all forms of national commerce and trade from State taxation. On this point a hasty glance over the series of decisions just considered, is convincing. If the spirit of the Constitution, Section 8, Article I, is to be carried out and Congress is to have power "to regulate commerce among the States" there can be no compromise between the National Government and the commonwealths on the question of State taxation of national trade. There can be no dodging of the fact that every State tax on such trade, under no matter what form the levy is disguised, is an interference with the Federal power or with the trade which that power designs shall be free of regulation. To say that a State tax on this trade when levied on the interstate receipts of a corporation is not a tax on the receipts but is only "measured by" those receipts, is a subterfuge. The revision of our tax laws should be so complete that no State levies on any form of interstate business would be allowed.<sup>1</sup> With this there should go a complete Federal control of national corporations and Federal taxation of the same. If it should be found, as is probable, that this policy would deprive the States of a share of their present revenues, it would be a simple matter for the National Government to divide the proceeds of its tax between itself and the State government on an equitable basis. A constitutional amendment may be needed to reach this end. A Federal Incorporation Act, a law providing for the national licensing of companies engaged in interstate commerce and a suitable national tax upon them, together with an Act exempting them from State interference by taxation or otherwise, are all needed to prevent State taxes on the operations of national trade. Most of the interference with such commerce has been tolerated by the Supreme Court on the ground that Congress had complete control of national commerce but had not acted nor used its regulative power, and that until it did so the States might regulate. In taxation a slightly different principle has been applied which possibly rests upon the same broad ground; viz., that Congress may at any time free national trade from all interference. The passage of such a measure by Congress would remove a heavy and harassing burden from national business. There is every reason of both a business and a constitutional nature why the concurrent authority of the States with Congress and the conflicting authority of the States with each other should now be ended.

<sup>1</sup> From the viewpoint of the commonwealths a revision is also sorely needed in order to prevent the wholesale evasion of personal property taxes on the plea of non-residence. See the Chapter on State Finances. Some form of co-operation between the States themselves and between the National Government and the States is now essential.

Most of the decisions which we have just examined, also show the serious dangers of double taxation. In the Horn Silver Mining case a Utah corporation which had paid a tax before, on its capital stock, for the privilege of incorporating, was also obliged to pay a second tax on its property in Illinois where the property was located; a third tax on its total capital stock to the State of New York, where it wished to open an office; and, under the present conditions, it would be obliged to pay a further tax to the Federal Government on its net income in excess of \$5,000. This means quadruple taxation, and, in case it entered into any other State to transact business, that State could require as a condition of entrance the payment of further taxes on its business *or on its total capital*. This is one of the strong reasons urged against any national laws restricting holding companies. It is necessary for a large concern which wishes to transact business in several States to incorporate subsidiary companies separately in each State, unless it is willing to pay a heavy tax on total capital to each commonwealth for the privilege of entrance. Since a national company of \$10,000,000 capital may be taxed on this amount in each State where it operates, it usually establishes a series of small local companies and owns the stock of these local concerns. If holding companies of this kind are discouraged by law, the national company operating in several commonwealths must be freed from their unjust taxation on property outside their limits.

**A Federal Appraisal and Collection.**—If a constitutional amendment should be found necessary to remedy the difficulty, a further reorganization of our tax system would seem advisable, in the form of a Federal appraisal of all taxable property and the collection by Federal officers of all taxes. This plan would end the great variety of appraisals and assessments upon the same kind of property in different States and within the same State. Farm land is now assessed at from 40% to 100% of its real value, according to the State or county in which it is located. The laxity of public officials is condoned by public opinion. But such a method offers tempting opportunities for favoritism or discrimination based on partisan politics or personal friendship. The burdens of taxation should not be subject to such inequalities. A Federal value would be uniform and would prevent the evasion of taxes which is now common in all the States where personal property levies exist. For years it has been customary for many wealthy New Yorkers to evade all personal property taxes of their State by declaring that they are residents of Newport, Rhode Island, where the personalty tax is light. In this way a great share of the property which should really be taxed in New York escapes entirely. Instances are not wanting in which property owners have "sworn off" their taxes, in every State where levied, on the ground that they were not residents of that particular commonwealth. A Federal assessment would effectively stop such a procedure. The collection

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the Supreme Court in the case mentioned, and in a host of other decisions. The effect has been to deprive the clause of all value for the taxpayer.

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### QUESTIONS

1. Summarize the chief constitutional clauses which safeguard us from illegal taxation.
2. What is a tax?
3. The State tax collector of New York attempts to levy on the battleships at the Brooklyn navy yard under the personal property tax of that State. Constitutional? Reasons.
4. Could New York tax the United States bonds owned by its residents? Cite reasons and authority.
5. The authorities of a new town which is on the boom promise all manufacturers locating within its boundaries in the first year, a bonus of \$1,000 each. Constitutional? Reasons and precedent.
6. They levy a tax for the purpose of erecting a municipal electric light plant. Constitutional?
7. The Illinois tax authorities proceed to collect levies upon the bonds of other States held by residents of Illinois. The bondholders object under the "full faith and credit clause" of Article 4. Explain this clause and decide the case with reasons.
8. The State of X issues bonds bearing interest at 5%. Five years later it levies an income tax to be collected at the source and instructs its State treasurer in paying the interest on its bonds to deduct the income tax from the payments to bondholders. The bondholders resident in other States protest. Decide the case with reasons in full and authority.
9. California levies a tax of 1% on all personal property held by her residents within the State. The collector assesses the national bank stock and national banknotes owned by John Doe. Doe protests, citing *McCulloch v. Maryland*. Explain in full Doe's argument and the Court's decision with reasons.
10. The New York legislature wishing to discourage the excessive sale of foreign hats in the State requires hat importers to pay a license fee of \$50 annually. The importers object to payment of the license. Decision, reasons and precedent.
11. Richard Roe is a travelling salesman for a Chicago house, he is required to pay a license fee in Kansas, but protests. Decision, reasons and precedent.
12. He solicits orders in Kansas for his Chicago house; the latter ships the goods to him and he delivers them to his customers. Kansas taxes the goods after they have reached him from Chicago. He protests. Decision, reasons in full.
13. Silas Wayback starts from Bytown Center, N. J., with a wagonload of tomatoes. He crosses to New York and sells them by the bushel *direct* to householders in that city. Can he be required to take out a peddler's license, and pay 50c for it?
14. John Doeheimer solicits orders for framed pictures. He receives the

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Why? Cite a precedent and c

17. Missouri requires auction  
fee to the State. John Doebur,  
auctioned only goods shipped f  
precedent and reasons.

18. In Chicago you order 1  
arrival, while they are still in the  
"for sale." Can they be taxed b

19. If they are not marked f  
to the warehouse of your Chica  
Illinois?

20. An automobile manufactu  
ent Sales Company in Philadelph  
in Philadelphia, Baltimore and V  
ship the cars to the buyers. Can  
manufacturer,—the tax to be me  
Decision, reasons and precedent.

21. Tennessee levies a tax on  
from the products of her own soil.  
dent.

22. Can a State tax the franc  
Congress?

A State imposes a license tax of \$1  
companies, express companies, tel  
in the State. Must the interstate  
fully with precedent.

23. A State taxes the real esta  
far as the property mentioned lies w  
ing that it carries the United Stat  
Decide with reasons.

24. Could a State under any circ  
stock of an interstate line which p  
reasons and precedent.

25. What is the unit rule of State

26. Present an --

points within the State from all sources, making this a levy in lieu of all other forms of taxation on carriers? Reasons.

31. Prepare a short essay showing the difference between State taxation on gross receipts from interstate commerce as such and a tax on gross receipts as a measure of the value of the carriers' property within the State.

32. Explain the difference between the constitutional status of State taxes on interstate common carriers and on ordinary interstate concerns.

33. Explain why a State has the right to tax an interstate company which is not a common carrier.

34. The Standard Typewriter Company has a factory in Chicago and opens a branch office in Kansas City, Mo., where it sells a large number of machines at retail. Must it take out a license in order to open its Kansas City sales room, if the Missouri law so requires?

35. The New Jersey Sand Company which produces and ships in interstate business large quantities of bar sand, is taxed in New Jersey on its capital stock and its property. Upon opening an office in Pennsylvania for the receipt and distribution of business and the sale of its stock to Pennsylvania investors, it is required as a license condition to pay a tax to Pennsylvania of 1% of its total capital stock. A similar condition is imposed upon it in Chicago and New York, where it sells sand and stock. What would be its defense and what would the Court decide?

36. Could the Sand Company also be required to pay a corporation tax to the United States measured upon its net income, if it had any left?

37. Would the Sand Company have to pay a Pennsylvania State license tax if it took orders only by mail and shipped its sand from New Jersey to Philadelphia without opening a Philadelphia office? Reasons.

38. Contrast the two taxes following and explain whether they are constitutional and why:

(a) A tax of 1%, levied by a State upon the total capital stock of a common carrier engaged in interstate trade, the tax to be paid as a condition of carrying on local traffic within the State.

(b) A tax of 1%, by the State of X, on the total capital stock of a mining company chartered in another State, and having most of its property located in another State, the tax to be paid as a condition of transacting local business within the State of X.

39. Can New York State require outside insurance companies to pay a higher fee before opening an office within the State, than it requires its own insurance corporations to pay for the privilege of a charter? Reasons and precedent.

40. Can it charge less on corporations coming from States which tax New York companies lightly than it does on those coming from States which tax New York companies heavily?

41. Minnesota decides to levy a tax on grain within the State. The owner of a shipment of wheat from North Dakota to New York temporarily withdraws the wheat from the railway at a point in Minnesota, and places it in his own elevator there while deciding whether to sell it or to ship it on east, as he has the privilege of doing under his agreement with the railway company. Can the Minnesota tax be levied on his wheat? Reasons and precedent.

42. Could a State tax all persons named Smith higher than those named Brown? Give reasons and cite clause of the Constitution.

43. Explain and illustrate when an interstate corporation is, or is not engaged in business within a State in such a way as to make it subject to the State regulative laws.

44. Owing to your success as typewriter sales agent for the State of P. the company also offers you the agency for the neighboring State of Q. The Q. State taxes on foreign corporations for the privilege of transacting business in the State are so high and the margin of sales profits so low that you seek to avoid this extra burden of state taxation in Q. Outline a plan.

45. Can a State constitutionally tax large inheritances at a higher rate than small inheritances? Explain.





## CHAPTER XXVI

### THE PARTY

**Party Usefulness.**—All representative governments the world over are run by political parties. Many devices have been tried, to avoid or ignore the party, many proposals made to change, reorganize or destroy it but in one form or another, better or worse it continues because it is the only known means of expressing political opinion. In its simplest form it is the co-operation of voters to elect their candidates or to urge their political principles upon the government. From this elementary state it often grows until it becomes a close, compact organization of voters, business interests, racial groups and social, and unfortunately sometimes even religious bodies. These are all cemented together by the party leaders and organizers through the use of every known means of stirring up the patriotism, the devotion, the fear, the greed, the hatred and the prejudice of their members. No human emotion or quality is left untouched in the effort to attract and hold the party man. But in this growth, artificially aided and stimulated as we have seen, the party often ceases to be what it was originally intended, a means of expressing political opinion, and falls under the domination of a group, an interest or a clique which seizes control of the party machinery and organization and uses it for selfish purposes. This parasitic tendency is everywhere visible in political struggles. It has produced that curious but very interesting conflict between the organization of the party, its machinery, its committees, its conventions and sometimes its leaders on the one hand and the vital force and life of the party, its real representation of the people on the other. Every human organization tends to form a crust of form, ceremonial procedure and tradition which binds it and hampers it from adapting itself readily to new conditions or even carrying out its original purpose. This has usually been the fate of party organizations,—they have become so rigid, so self-centered, and so exclusively controlled by a compact minority of the membership that they seek to become the master not the servant of the people. Once a party reaches this stage nothing but the chastening influence of defeat at the polls will bring it back to its true representative rôle. We shall accordingly consider first, the organization and second, the work of the party.

**The National Committee.**—Each party nominates its Presidential candidate in a great national convention held in June or July of the election year. In all political gatherings and conventions, where hostile factions are struggling for supremacy, the control

of the preliminary arrangements is all-important,—the naming of the delegates, the decision of contests for seats, the temporary presiding officers and the committees, all influence directly the chances of each candidate for the nomination. The seasoned politicians who act as managers for each candidate and his "boom," concentrate their efforts upon getting control of this preliminary machinery, and the most important part of the mechanism is the national committee. This body carries on its work quietly behind the scenes but none the less effectively. It, rather than the convention, is the real head and center of the party, organizing, financing, and managing the presidential campaign. It is made up of one member from each State and territory, chosen by the delegates of the State in the national convention. This illustrates admirably how we often preserve the form of representative democracy while in substance we are establishing a thoroughgoing absolutism or oligarchy. In form the body is only an obedient committee of the national convention,—in substance it controls the convention. So sweeping are its powers that rival candidates within the party always do their utmost to gain its support, for usually he who controls the committee, rules the convention.

1. The committee decides the time and place of holding the convention. Much depends on this. The marching throngs, the oratory and the enthusiasm of convention time will do much to strengthen the wavering party allegiance of a large city. The minority party usually decides to hold its convention after the majority's in order to take advantage of any mistake and to draft a stronger platform.

2. The committee makes the first decision on all contests for delegates' seats in the convention. In every Presidential nomination there are many of these contests in which two factions of the party will send rival delegates to the convention, each claiming seats and the right to vote. Where the struggle for the nomination is close two factions will often send a host of contesting claimants for seats on the theory that they have nothing to lose and much to gain. A preliminary roll of the convention must be made by some authority of the party and this work falls to the national committee. The roll is subject to revision as is also the decision on contested seats,—a committee on credentials is later chosen which goes over every contest and makes a report with recommendations to the convention. But this body seldom makes any radical changes in the report of the national committee itself, so that a victory in the preliminary decisions by the national committee is of the utmost importance. Clearly then, this gives to the committee the power to seat enough delegates provisionally, from one side or the other, to influence the vote of the convention. As a rule, **partiality** is shown but seldom enough to decide the nomination. An exception occurred in 1912, when there were 234 contests in the Republican convention, because of factional differences. The national com-

mittee worked overtime for a week on these contests and the decision so made had an important bearing on the choice of a candidate and widened the breach in party ranks, which afterward caused defeat at the election. The convention machinery thus falling into the hands of the conservative element of the party, the liberals were defeated on every proposal which they advanced in the convention. They remained in the body until the end, however, and then called a seceding convention and formed the Progressive party, carrying with them the bulk of the Republican vote in the election of that year.

3. The Committee chooses the temporary chairman of the convention who opens the proceedings, presides until the permanent chairman is elected, and makes a lengthy address which is usually called the "keynote speech" of the party's campaign, because it is supposed to reflect the mature sober thought of the party leaders upon the chief issues of the election. It is during the preliminary manoeuvres and the "jockeying for position" at the beginning of the race that both sides try their hardest to score an advantage. Motions are made to appoint special or temporary committees, points of order are raised and supposedly subtle devices are planned by the skilled parliamentary strategists of each faction to gain an advantage over the others. Since the temporary chairman must rule on these, his choice is always made with greatest care by the controlling group in the national committee, in order to preserve the rules of fair play and above all to maintain the supremacy of the dominant element.

4. The committee watches over political conditions in all the States during the intervening 3 years when there is no Presidential election; it also acts as an executive body to conduct all important party affairs during the interval. The convention being a turbulent unwieldy meeting cannot carry on the continuous administration of the party affairs. We are apt to underestimate the scope of this activity, which must be carried on year in and year out by the organization.

Parties do not win great victories by a single burst of enthusiasm nor by a short campaign immediately before the election but rather by slow persistent and steady work in season and out of season and by the perfection of a system which brings the party workers into close personal touch with every voter. Such a system is not of mushroom growth; it must be developed with the same patience, energy, skill and persistence that are needed to build up any business machine. This is the work of the national committee. We hear of it only amid the excitement of a Presidential campaign, but its members are constantly in touch with the political conditions of every State and it is their business to know the effect of party policies on the political opinion of the country. The members of the committee are business men, lawyers, and political leaders of unusual administrative ability. The chairman of the committee

followed in every campaign. The corporations of the country contributing to the campaign from the national headquarters of the recent Presidential election.

When a great economic problem arises, or by corporate regulation, or by the business interests of a business man of marked executive ability, chosen, either as chairman or as a member, appeals directly to the "people" by means of a system of small contributions. Owing to the strong preference in political affairs it is an era in which party funds are raised by small contributors. The newer party of this kind, the most effective members, being that of the small fee is asked of every membership. The progressive party method, but with less success, a proportion of the funds is secured.

6. The national chairman of the party orators and distributes funds throughout the country. It is also his duty to organize a committee which is composed of members from each State or territory. Congress...



candidates and a large amount of statistics and information showing that the party in the past has stood for popular issues while its opponent has been guilty of grave mistakes.

8. The national committee is authorized to fill vacancies in the ticket in case of death or resignation of any candidate provided there is not sufficient time to reconvene the Convention.

**The Convention.**—The call for the convention having been issued by the national committee, delegates are selected by the party in each State, the number being equal to twice the number of congressmen and senators to which the State is entitled. The Democrats choose their delegates at large in the State; the Republicans select their delegates, two from each congressional district, in primaries, or by a district convention, and four, representing the Senators at large, by a primary or a State convention. The territories are each allowed two delegates by the Republican party and six by the Democrats. Hitherto neither party has shared its delegates among the States according to number of party members. A Democratic State has had as many delegates in a Republican convention as if it had voted solidly for the Republican ticket, and vice versa. This system of apportionment has worked serious harm in all the recent conventions of both parties. In the Republican convention the balance of power, varying from one-fifth to one-third, was held by delegates from the South and South-west where there are no Republican voters. To "corral" these delegates was the first effort of a prospective candidate, and the delegates from this section were "seen" and "conferred with" long before the convention opened.

In 1908, delegate Burke of Pennsylvania offered a resolution to correct this inequality in apportionment. It provided that in future conventions each State should be entitled to four delegates and to one additional delegate for every 10,000 Republican votes cast at the preceding presidential election. The resolution was reported unfavorably by the committee on rules with a strong minority report in its favor. The proposed change would have reduced the representation of the Southern States and increased that of the Republican commonwealths. Alabama, for instance, would have six votes instead of 22, Georgia 6 instead of 26, Mississippi 4 instead of 20, South Carolina 4 instead of 18, Texas 9 instead of 36. On the other hand, the Northern States would increase in representation—New York from 78 to 90, Illinois from 54 to 67, Michigan from 28 to 40 and Pennsylvania from 68 to 88. In pointing out the injustice of the present method, Mr. Burke said:

"What is your opinion of a ruling that allows South Carolina to cast 1 vote (in the convention) for every 136 Republican votes, while it gives to Colorado 1 vote for every 13,000 votes cast at the general election. A ruling . . . that gives to Mississippi 1 vote for every 159 votes that she casts . . . and to Pennsylvania, Indiana and Illinois . . . 1 vote for every 11,000 votes that they

cast? If Pennsylvania were given the same representation in this Convention to-day as South Carolina we would have 650 delegates on this floor. Ohio (if treated the same) would have 540 delegates in this convention."

The final vote on this proposed change was 471 in favor of the Burke plan and 506 opposed. The Southern States were, of course, a unit against it, and scattering votes from the North went also to that side. This close vote clearly indicated a trend of opinion in the party in favor of some change which would eliminate the present inequality. In 1913 a special meeting of the Republican committee was called to consider the cutting down of Southern representation in the convention and it was agreed to refer the matter to the various State organizations. During the year that followed a majority of the party authorities adopted the plan for a representation of each State based on the Republican vote of the State, and the Chairman of the National Committee thereupon, on October 25, 1914, declared the new plan in effect in the choice of future Republican conventions. It will have the effect of reducing the total number of delegates by 89, most of which reduction occurs in the Southern representation. The change was approved by the party authorities in several Southern States.

**Presidential Primary.**—For the election of 1912 ten States adopted the presidential preference primary in response to a general demand for greater fairness and freedom in choosing delegates to the national conventions. That this is not a local or sectional feeling is shown by the wide distribution of the States adopting the new system. California and Oregon on the Pacific Coast, Massachusetts and New Jersey on the Atlantic Coast, while other commonwealths of such varying local conditions as Michigan, Montana, Maryland, and South Dakota also subscribe to the plan. The New Jersey law is a general type of this legislation; it provides that delegates to the national convention of all parties shall be chosen directly by the party voters and may be pledged to support a given candidate. Further, the voters may state their choice of candidates on the ballot and names are placed on the ballot by petition requiring 1,000 signatures. The delegates to the convention are chosen by congressional districts with the usual provision for an election at large for the delegates at large. Some confusion arose from the first application of this system and from the action of the Republican national convention in refusing to respect the State laws on the subject, particularly in California. It happened in some of the States that the majority of the voters expressed a preference for certain candidates and for certain delegates who were not favorable to these candidates. The present Presidential primary system, which is in the main fair and correct in principle, needs revision as is shown by the following admitted defects: <sup>1</sup>

(a) The national convention may refuse to be bound by State laws.

<sup>1</sup> See the *American Year Book*, 1912.

(b) A uniform nominating process throughout the country is necessary.

(c) In order to avoid the confusion of State and national issues the enrollment in a national party should be controlled by Federal law.

(d) Instead of a series of delegate conventions it would seem wiser to establish a national direct primary allowing the two candidates with the greatest number of States and districts in their favor to be the nominees at the general election.

**Work of the Convention.**—The convention serves many purposes:

It brings together the national leaders and workers of the whole party and stimulates them to renewed effort.

It makes the choice of the party's candidates although, as we have just seen it is not the best means of doing so.

It drafts the party platform for the election.

It chooses the party authorities, especially the national committee, for the following four years.

It stirs up partisan enthusiasm and revives the flagging interest of the public. The convention represents the sentiments, feelings, the patriotism and the eloquence of the party. There is a renewal of old traditions and, above all, an enthusiastic belief that the party represents some great popular cause. In this way the convention unites the contending factions, harmonizes discords, electrifies into new life the party workers and sends every man home with an invincible determination to do or die "for the ticket." The balance of power in every convention of the majority party is controlled by office-holders and in both majority and minority conventions the senators and congressmen play an important rôle. The proceedings of the body usually follow the same general course. The order of business in the 1912 conventions was:


1. The preliminary decision of the national committee on the contested seats.

2. The calling to order of the convention itself by the chairman of the national committee.

3. The election of a temporary chairman who is decided upon in advance by the leaders in the national committee and accepted by the convention. He delivers a lengthy speech which as we have seen is the "keynote" utterance of the campaign, from the viewpoint of the national committee.

4. The roll of the convention is called by States, each State nominating one of its delegates for each of the following committees: credentials, permanent organizations, rules, resolutions. The committee on credentials is to decide officially the contests for seats in the convention, that on permanent organization nominates a set of permanent officials, that on rules proposes a set of rules for the parliamentary procedure of the convention; these are usually the rules of the House at Washington. The committee on resolutions drafts the party platform.





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at the urgent insistence of Mr. Bryan, the nomination was made first and the platform adopted afterward. This is a wise proceeding as the candidate must necessarily have much to say about the principles which he is to represent. The Democratic convention requires a two-thirds majority for nomination. Mr. Clark had led on several ballots and on 8 of them had a clear majority, but the two-thirds rule prevented him from gaining the coveted prize. Mr. Wilson's vote steadily rose with each ballot until the dramatic announcement of Mr. Bryan demanding that the convention pledge itself to a candidate who would be in no wise allied with the "big business" interests of the country. This startling resolution, which was passed, led to a scene of intense excitement and on the next ballot so increased the vote for Mr. Wilson, who was the candidate of the advanced or liberal faction, that his nomination was a foregone conclusion. The candidates are proposed by a roll call of the States, the chairman of each delegation having the right to place a name before the convention. This right is usually waived after the leading candidates have been presented and the roll call is then discontinued by common consent. Speeches are made both in nominating and seconding each name, and it is here that the gallery is called on to do its best. In the Republican conventions of 1904 and 1908 an immense number of tiny flags had been distributed throughout the gallery and these were suddenly waved at a given signal when Mr. Roosevelt's name was mentioned. The result was picturesque and effective. It led to similar manifestations in both the conventions that followed. The names having been presented, the States vote in alphabetical order.<sup>1</sup> Until 1912 the Democratic party used what was known as the "Unit Rule" by which all the votes of a State go to the same candidate. At the Baltimore convention this rule was broken and seems likely to be abandoned. It works much injustice and inaccuracy in expressing the real sentiment for the respective candidates. When it becomes clear that one of the candidates will gain the desired majority, all the remaining States turn into line and when the vote is announced the representatives of other aspirants move that the nomination be made unanimous. With surprising promptness an immense banner portrait of the successful nominee is then brought into the hall where it is displayed during the remainder of the convention.

<sup>1</sup> Often the contests for disputed seats are so close and the evidence on both sides so doubtful that the committee on credentials wishes to placate both sides, it will seat both contestants and give each one-half a vote. This explains the fractional ballots which sometimes occur. In the absence of a delegate his alternate votes for him and in the republican convention of 1912 the chairman, Senator Root, ruled that if a delegate refused to vote his alternate would be called on "to do his duty." Some of the Massachusetts delegates were Roosevelt men and after the seating of a large number of Taft delegates illegally, as it was claimed, the entire Roosevelt representation refused to vote. The Massachusetts alternates were Taft men and two of them were allowed to vote in place of the regular delegates. This creates a new precedent and shows the importance to each candidate of controlling the presiding officer.

8. The platform is presented by the chairman of the committee on resolutions. He has a difficult task to perform. The document must take a definite stand on many important questions, yet it must be worded in such a way as to catch as many votes as possible. For these reasons it is usually made up of general statements which can well be interpreted to suit the wishes and hopes of all factions of the party. A glance over recent platforms shows a surprising unanimity verging on monotony in the methods of expression employed. The party "views with alarm" the evil machinations of its rival; it "deplores the lack of patriotism" shown by the foolish and blundering attempts at legislation, of which that rival has been guilty; it "points with pride" to the constructive efforts of its own followers and to the "sterling honesty and far-sighted statesmanship" of its candidates; it advocates "wise and well-considered laws" on disputed subjects; it demands "fearless honesty and rigid economy" in the public administration; nor does it forget to mention both the "toiling masses" and the "plain people" many times and with affection.<sup>1</sup>

<sup>1</sup>The following extracts from the party platforms of 1912 on two of the most discussed problems before the people at that time, show how closely the party policies coincide on important questions and how strenuously the parties try to show that they do not.

#### THE COST OF LIVING

Democratic.—"The high cost of living is a serious problem in every American home. The Republican party, in its platform, attempts to escape from responsibility for present conditions by denying that they are due to a protective tariff. We take issue with them on this subject and charge that excessive prices result in a large measure from the high tariff laws enacted and maintained by the Republican party and from trusts and commercial conspiracies fostered and encouraged by such laws."

Republican.—"The steadily increasing cost of living has become a matter not only of national, but of world-wide concern. The fact that it is not due to the protective tariff system is evidenced by the existence of similar conditions in countries which have a tariff policy different from our own, as well as by the fact that the cost of living has increased, while rates of duty have remained stationary or been reduced."

"The Republican Party will support a prompt scientific inquiry into the causes which are operative, both in the United States and elsewhere to increase the cost of living. When the exact facts are known it will take the necessary steps to remove any abuses that may be found to exist, in order that the cost of the food, clothing and shelter of the people may in no way be unduly or artificially increased."

Progressive.—"The high cost of living is due partly to world-wide and partly to local causes; partly to natural and partly to artificial causes. The measures proposed in this platform on various subjects such as the tariff, the trusts and conservation, will of themselves tend to remove the artificial causes."

#### CORPORATE REGULATION

Democratic.—"A private monopoly is indefensible and intolerable. We therefore favor the vigorous enforcement of the criminal as well as the civil law against trusts and trust officials, and demand the enactment of such additional legislation as may be necessary to make it impossible for a private monopoly to exist in the United States."

9. The vice-presidential nomination is made separately. Great care is exercised to choose a nominee who will strengthen the ticket by attracting the voters from some doubtful State. Certain of these may be swung into the party column by the choice of a favorite son. New York, Ohio, and Indiana are often called on to furnish either the head or the tail of the ticket. Not infrequently the vice presidency is also a sop thrown to the defeated faction in the party to enlist their support of the ticket.

10. The election of the national committee for the ensuing four years is carefully prearranged and carried out with precision. Each State is entitled to one member on this committee and the State leaders instruct the delegations as to who this shall be. The fiction is that the convention elects this committee. The fact is that the delegates from each State transmit to the convention the name of the man chosen by "the chief" to represent the State on the national party executive. It is not a surprising coincidence that this name is usually that of the chief himself.

11. The final action in the convention is the appointment of a notification committee which later, at a time fixed by the candidate, waits upon him and announces to him his nomination. This is made the occasion of a lengthy address by the nominee, in the nature of a statement of his political principles, an elaboration of certain points in the platform and sometimes his own independent additions to it. Mr. Bryan received his committees at his home in Lincoln, McKinley upon the lawn of his residence in Canton, Mr. Roosevelt at his Oyster Bay estate and Mr. Wilson on the grounds of the summer residence of the governor at Sea Girt, N. J. On all of these occasions the nominee has strengthened greatly his hold upon the party leaders by informal conferences with them and has undoubt-

"We regret that the Sherman Anti-Trust law has received a judicial construction depriving it of much of its efficacy, and we favor the enactment of legislation which will restore to the statute the strength of which it has been deprived by such interpretation."

Republican.—"The Republican Party favors the enactment of legislation supplementary to the existing Anti-Trust Act which will define as criminal offences those specific acts that uniformly mark attempts to restrain and to monopolize trade, to the end that those who honestly intend to obey the law may have a guide for their action and that those who aim to violate the law may the more surely be punished. The same certainty should be given to the law prohibiting combinations and monopolies that characterizes other provisions of commercial law, in order that no part of the field of business opportunity may be restricted by monopoly or combination."

Progressive.—"We demand that the test of true prosperity shall be the benefits conferred thereby on all the citizens not confined to individuals or classes and that the test of corporate efficiency shall be the ability better to serve the public; that those who profit by control of business affairs shall justify that profit and that control by sharing with the public the fruits thereof. We therefore demand a strong national regulation of interstate corporations."

It is an interesting commentary on party platforms that both the republican and progressive platforms proposed a national trade commission but the democratic did not,—and that it was the democratic party which placed the trade commission law upon the statute book.

edly added greatly to his popularity by the skillful framing of his reply to the notification.

On the whole the convention offers many picturesque, interesting and dramatic scenes which lend intensity to our political life, but we may not escape the question,—does it do its work? An impartial examination forces on us the conclusion that as a means of choosing the party's candidate for the Presidency the convention must soon be superseded by some simpler, more direct and less easily manipulated method. All our political machinery to-day is undergoing the same searching test of effectiveness. There is no longer any reason why we should resort to unduly roundabout and indirect means. Nor is machine-made applause the best test of popular favor. Why not allow the voters themselves, by preferential ballot, to make the nomination?

**State Party Organization.**—The local machinery of a party is organized on its national model. In each commonwealth there is a State committee, a large body which seldom meets, most of its work being performed by the chairman. The State leader, who is usually one of the Senators, controls this committee completely. He consults with its members and with the local leaders from each county and congressional district, but all of the committee's resolutions, decisions and other acts are O. K.'d by the leader before being presented to the committee itself. Nevertheless the committee may be important in times of emergency or crisis or factional warfare for control of the party organization. This is clear from a glance at its chief powers which are: (a) to draft the platform of the party in the State, (b) to fill vacancies which may occur among the party candidates shortly before election; (c) to conduct correspondence with the various local, county, city and congressional district committees and with the national committee. This latter authority is much more important than it seems,—it gives the State committee power to determine which is the officially recognized party head in any local district. The local office-holders and those who want office are continually bickering for control of the local party organization. In a dispute between two rival factions the State committee makes an authoritative decision and by this means is often able to put down an insurrection in the party organization. No better answer than this can be given to those who favor "reform within the party," for let any independent faction no matter how numerous once show its head within the camp and attempt to control the organization, and both it and its leaders will be excommunicated by the all-powerful State committee through the simple device of recognizing the other faction—the regulars. (d) It is in the State committee, too, that the slate of delegates at large to the national Presidential convention is usually prepared, and advice given to the leaders in congressional districts as to the choice of their delegates to the convention. The State committee is chosen by the county committees,—one member from each county. Most of the States

now have direct primary laws enabling the members of the party to choose their own nominees for State offices. In the other commonwealths conventions are held for this purpose and here the State committee issues the call for the convention and dominates the body in much the same way that the national committee controls its convention. The direct method of nomination has now become so unpopular that the days of the convention appear to be numbered in all of the commonwealths.<sup>1</sup> (e) One of the less important functions of the State committee about which, however, much enthusiasm is shown, is the endorsement of the national platform in Presidential and congressional elections. This is done by a series of high-sounding resolutions which are intended for "domestic consumption" among the voters of the State. (f) The collection and distribution of funds for the State campaigns. Many State laws now provide for the publication of receipts and their sources, and expenses for all purposes connected with nominations and election campaigns.

**Local Party Organization.**—The direct primary laws have abolished the local convention which was formerly the means of choosing candidates and making platforms. There remain now only a series of committees which represent, however, the strong machinery of the party. These the rival factions in the organization eagerly seek to control. These committees are:

- The city or county committee,
- The ward committee,
- The district committee.

The city, or in the rural sections the county committee, is a body of 40 or 50 men chosen by the ward committees or elected by the voters at the primary. Its powers correspond to those of the State committee and it uses to the full its prerogative of recognizing and supporting the local division committeemen and leaders and thereby determining who shall have the official party control in each locality.<sup>2</sup> It is the city committee which "steam-rollers" all dangerous independent leaders within the party fold. Its control of the funds also is unquestioned and despite laws requiring public statements of receipts and expenses most of the city committees to-day are still irresponsible; they are sometimes accused of misappropriating a part of the funds which pass through their hands.

The ward committee or, in the rural sections, the township committee, is chosen directly by the party members at the primary and

<sup>1</sup> One of the recent direct primary laws, that of 1913 in Pennsylvania, provides that the State committee members shall be elected by the party voters, two committeemen from each of the fifty senatorial districts. The State committee elects the national committeemen from the State except when the national party rules provide otherwise. See Pennsylvania Laws 1913, page 720.

<sup>2</sup> A faction which is not "recognized" by the city committee has no official party standing, its leaders and workers are dismissed from the city offices, and being separated from the "pay roll" it speedily languishes unless it is based on something stronger than the favor of the organization; or can secure extensive public support. The close identity between party regularity and city office-holding is further set forth in the Chapter on The Civil Service.

is a miniature city committee. Under it come various district committees of which there are often 30 or 40 in a city ward, according to the density of the population. These are also chosen by the voters and it is to these latter that the real work of getting out the vote is delegated. Each district chairman has a certain sum of money allotted to him by the county committee; he also directs the party workers under his control. The central county or city committee is kept well informed of the conditions in every subdivision at all times. The personal interests and affairs of each voter or the means which may be used to influence him must all be familiar to the local workers in the party organization.

For this purpose each district is divided into small voting divisions or precincts under the control of responsible workers and it is the duty of these men to keep in the closest possible touch with every voter in the division. The worker keeps a book giving the name, residence and occupation of his neighbors and he carefully records before election time the way each man is expected to vote, with a list of those who are doubtful. If this work is well done the city or county committee is able to report to the State committee the apparent result of the election over a week before it takes place.

**Personal Work in the Party.**—We must understand clearly that the work of the party is after all personal in its nature. The voter must be appealed to by a personal talk and through direct influence rather than by circulars or campaign letters. The party is therefore built upon the division worker as its foundation stone. If he is active and intelligent, and if he keeps in friendly touch with the voters frequently from one election to another, the party usually succeeds in his division. The committee chairmen recognizing this, hold frequent meetings with the workers to enthuse them with a spirit of watchfulness and devotion. Observe the clever way in which the worker is made to feel that he is responsible for results in the following speech delivered before the city committee in one of our largest municipalities, by an exceedingly capable and "practical" leader:

"We just went through a campaign in the last primaries, which shows something lacking in some sections of the city which demands reconstruction. Part of that condition is due to some men in this room. No man here is better than his fellow, and we demand the same thing from all, party loyalty and the polling of the party vote at every election.

"I want to say that in the 21 years that I have been in politics I never saw a Moses come down and assume leadership. That must come from work and the support of machinery all along the line. We have nothing really to fear in the coming election if that loyalty is evinced and the men stand by their guns. We have a great asset in the honest and straightforward administration at City Hall. At the head of our ticket is S. P. R. who is a man for whom the workers can ask support fearlessly. He has shown fidelity and

uprightness in all his acts and proved himself a most fearless official."

Taking up an analysis of the causes of the revolt at the last primaries, the speaker concluded:

"As a result of experience some ward leaders imagine that they dominate the entire locality. As long as they hold themselves above the people and do not continue the work necessary at election times and throughout the year so long will they be sure to get such a jolt as they received at the last primary. Let us remember that we must not treat with disdain or pass over men who said something harsh against us in the past. If we go to the offices or homes of these men and discuss conditions with them instead of having their opposition we will have their support. That is one thing we have got to do to win in November. All kinds of criticism has been made against us. There is no act of mine that I am ashamed of. I and all of you weigh us against the opposing leaders. To-day we find the same old outfit attempting to revive the same old conditions of a few years ago. So what we must do to overcome this is to get out among the people, learn their needs, what they are complaining about, and do what we can to rectify conditions. Office-holders—men who owe their livelihood to the organization—have been derelict. It is up to the Ward and City Committeemen to make the office-holders recognize the duty of maintaining the Organization. If they go along on that platform and do what is required of them, we will have a larger majority for the ticket in November than before.

"In one division there were twenty-four office-holders and only nineteen votes were cast for the head of the ticket at the primary election. That condition cannot remain. In some sections of the city there are 6,000 office-holders. They did not come up to their duty in the primary, while 4,000 were required to carry the ticket to victory." Before the meeting adjourned the leader cautioned the committeemen to be alert during the summer. He requested that they leave their addresses if they left the city, as it might be necessary to summon them at any time.

**Sources of Party Funds.**—The chief sources of supply for the party treasury are:

- (a) Assessments upon office-holders.
- (b) Voluntary contributions from large "interests," to the party, and from candidates.
- (c) "Tribute" exacted by the management from the underworld and from corporations which require special privileges and favors.<sup>1</sup>

<sup>1</sup> On this interesting subject Henry J. Ford in his *Rise and Growth of American Politics*, page 323, says, "The cost of party subsistence cannot be computed. Exact data are unattainable. Although various estimates have been made, they are all worthless and are all probably below the mark, although some of them mount into many millions of dollars. It is quite probable that party organization costs more than any one of the regular departments of government. It is a fond delusion of the people that our republican form of



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additional source of revenue. This is found in "tribute." The extent to which it may be levied is limited only by the conscience of the organization—and it has a conscience—and the complacency of the public. There are always contractors who want municipal and other public work on street and road repairs, water supply systems, buildings, sewers, etc. There are great public service corporations, street and steam railways, gas companies, electric light and power concerns, all of which want to erect their poles, lay their conduits and pipes and secure permission to transact business within the city or State. There are countless small dives, speak-easies, gambling places and the resorts of vice which are operating contrary to the law and which need "protection" from police raids. Not a dollar collected from any of these sources is legally paid. Yet a continuous series of revelations in large cities from New York to San Francisco show that the amount so turned over to individuals and to party agents must reach a staggering total,—much of it paid as personal graft. A great deal leaks through the collector's fingers into devious channels of officialdom but some of it reaches the party treasury and forms either directly or indirectly one of the chief means of rewarding the party workers. Looking at it from a slightly different angle, the party *asks* contributions from the office-holders and the protected, vested interests,—it is *offered* tribute by the underworld for freedom from prosecution, while individual vampire leaders demand and *take* from both legitimate and illegitimate enterprises their personal quota. This process goes on until either the underworld revolts, as in the Rosenthal case in New York, or through some chance combination of circumstances, an investigation into political graft is ordered and the public has proved to it what it has for years suspected or known. The whole sordid list of sources of tribute is then laid bare.

To many these conditions of party finances present a hopeless picture of decadence but on the whole there is every reason for encouragement in the rising standard of honesty and a growing public unwillingness to be hoodwinked by party shibboleths and war cries. It is impossible to wax enthusiastic or remain servile under the direction of party leaders who are known to be supported by such questionable means. Political organizations, particularly in the local governments, which are so unfortunately based on illicit sources of revenue, cannot command the same unquestioning obedience from the masses of the voters as before the disclosure of their predatory nature. The change in party standards is slow but it is undoubted and with every demand for the increased efficiency and greater usefulness of our governments, a lever is placed under the party system to raise it towards a higher standard of honesty. *In all this change we must remember that the improvement is not wrought by stronger prohibitions of dishonesty nor heavier penalties on political crime, but by the action of new forces which attract public attention to higher and more useful standards of govern-*

ment. The demand for clean streets, cheaper light, better car service, more efficient schools, purer water supply and other improved living conditions is incompatible with and strongly hostile to loose, corrupt and dishonest party methods. It is not the stronger prohibition of corrupt partisanship but the new ideal of government usefulness, which is raising the party from its ancient conditions.<sup>1</sup>

**Public Regulation of Party Finances.**—The same popular sentiment which decreed that party organization, committees and primaries must be subject to government control, has led to the passage of numerous acts providing for publicity of campaign accounts and forbidding corporate contributions to party funds. Most of the States have laws containing both of these provisions. They were greatly stimulated by the insurance exposures in New York, which showed the general custom of the large companies to con-

<sup>1</sup> Professor Ford believes that the party's lack of responsiveness to the popular will and its exclusive control by professional politicians, and by corrupt elements masquerading as friends of the party, are chargeable to our failure to make the party responsible, by giving it full control of the government. We should unite executive and legislative authority so that the same persons would wield both. He holds that if we gave to the party majority, control over both these departments, we should force responsibility on the party and by the same act place it under popular control. In *The Rise and Growth of American Politics*, page 326, he contrasts our party power with that in England. "Unlike an English party, it cannot itself formulate measures, direct the course of legislation, and assume the direct responsibility of administration. All that it (the American party) can do is to certify the political complexion of candidates, leaving it to be inferred that their common purpose will effect such unity of action as will control legislation and direct administration in accordance with party professions. The peculiarities of American party government are all due to this separation of party management from direct and immediate responsibility for the administration of government. Party organization is compelled to act through executive and legislative deputies, who, while always far from disavowing their party obligations, are quite free to use their own discretion as to the way in which they shall interpret and fulfil the party pledges. Meanwhile they are shielded, by the constitutional partitions of privilege and distributions of authority, from any direct and specific responsibility for delay or failure in coming to an agreement for the accomplishment of party purposes. Authority being divided, responsibility is uncertain and confused, and the accountability of the government to the people is not at all definite or precise." And on page 352—"But so long as our constitutional system provides that an administration chosen to carry out a party policy shall be debarred from initiating and directing that policy in legislation, just so long is the party machine a necessary intermediary between the people and their government, and just so long will party management constitute a trade which those who have a vocation for politics cannot neglect, and those who make a business of politics will make as profitable as they can." Page 356—"On the contrary, there is abundant evidence to confirm the opinion that party organization continues to be the sole efficient means of administrative union between the executive and legislative branches of the government, and that whatever tends to maintain and perfect that union makes for orderly politics and constitutional progress; while whatever tends to impair that union, disturbs the constitutional poise of the government, obstructs its functions, and introduces an anarchic condition of affairs full of danger to all social interests. This is the cardinal principle of American politics."

tribute to the campaign funds of both parties. Their investigations soon revealed the fact that this was a general practice among all the larger corporations. The Federal Government in 1907 enacted a law forbidding such gifts by corporations to the political funds of candidates for the Presidency or for Congress. The Federal Act of June 25, 1910, also provides that national political committees and organizations taking part in elections for representatives in Congress shall have a chairman and a treasurer. The treasurer must keep a "detailed and exact account" of all money or its equivalent received or promised to the committee and its agents, and the names of all persons, firms, or other committees from whom such amounts are received and all expenditures and promises of payment made by the committee or its agents, with the names of the persons to whom the disbursement is made. All payments in excess of \$10 shall be vouched for by a receipt giving the particulars of expense. The treasurer of the committee is required to file with the clerk of the House of Representatives at Washington within thirty days after the election an itemized detailed sworn statement covering such receipts and expenditures and including the total sums received and disbursed. Likewise any person, firm or association, except the political committees above described, who shall make any contribution of more than \$50 toward a congressional election, except to a committee subject to the Act, shall also file a statement under oath with the clerk of the House of Representatives. The act does not apply to local political committees but only to those who take part in elections in more than one State.

**Causes of Party Subservience.**—The question is often asked, why are so many men of intelligence bound to their parties by an allegiance verging on servility and why do they even tolerate dishonesty in the leadership of the organization? There are three strong reasons for this feeling. First—The party represents business interests, as we have seen, and citizens too often hesitate to disturb the party structure so long as it subserves those interests. Second—The party has great historical traditions. It "saved the Union," or it "was established by Thomas Jefferson." The voter whose father and grandfather "voted the ticket" is slow to desert the party of his ancestors and even when his interests and his ideals urge him to do so, the detaining force of tradition stays him and he "goes along" with his party. Many a citizen has arisen on election day firmly convinced that the time has come for independent action. But as he approaches the polls and realizes that a vote for the opposite party means a blow at the organization for which he and his friends have stood for many years, a doubt enters his mind. His ballot is handed to him, familiar faces of the local political workers surround him, it may be a close election and these men are depending on his vote; they rely on him. The doubt grows stronger. He enters the booth and takes the pencil to mark his ballot; his mind is assailed by a flood of doubts and misgivings. He thinks of the

grievous blunders and "reasonable" practices of the opposite party, for which he is now about to vote. He remembers that its leaders are politicians like those of his own, he recalls that the talk of "reform" is too often a mere ruse to put ambitious men into office, he considers again the long line of strong candidates who have represented his party in the past, and his family tradition of loyalty to those candidates—insensibly his pencil creeps over to the column of his first allegiance, and he votes the old ticket.

**Party Clubs.**—Shrewd political leaders realize this force of party tradition and make capital of it. The political speaker who appeals to his audience solely on the issues of the campaign loses half his opportunity. Party loyalty, party history, party prejudice are solid, substantial facts in every political campaign and they play as important a part as does the question of policy. The third reason for subservience to party is the strong influence of social connections and personal friendships within the organization. This is noticeable in the large cities where the political leaders form party clubs which play an active and continuous rôle in the social life of every neighborhood. These clubs offer an inexpensive and attractive social center for the men of the district, and it is made the duty of every party worker to frequent them regularly and cultivate the acquaintance of his neighbors in them. The clubhouse, often owned by the club, is fitted up with every comfort, convenience or attraction demanded by the tastes of the membership. The dues are not high, nor are the rules oppressively strict. Here one sees the local leader in his most accessible mood, and here too one may rub elbows with the division and precinct workers and call them by their first names. The club is the great clearing house of political information and rumor; it serves all the purposes of a trade union or a business or professional body and keeps the younger element interested in and acquainted with their work.

Leaders in this way are able to hold the allegiance and interest of the voter and the workers, during all parts of the year even when no election is to be held. The growth of the club movement has been so rapid that in 1887 a national league of Republican clubs was formed to be followed soon afterward by a similar league of Democratic clubs. Each league holds its convention modeled on the plan of the party's national convention. As new conditions arise to affect the party's welfare the leaders extend the club movement to cover each new social element in the city. They form associations among the various races and other groups who might be interested in the party; there are German-American Clubs, Italian Clubs, College Clubs, and Young Men's Clubs, etc. Through all this activity the party organization becomes doubly entrenched and permanent because it is built upon a broad social foundation.

But in spite of the undoubted strength of the system that has been so shrewdly built upon this basis, party allegiance is rapidly weakening. It is a peculiar result of modern inventions that human

interests, occupations and pleasures are broadening with increasing rapidity. The former narrow and intense interests no longer control our actions. We are still influenced by the strong personality of a great political leader but we refuse to follow with enthusiastic, unquestioning obedience the commands of any party organization. Our broadened horizon has clearly led us to do an ever larger share of our own thinking. The old parties demanded Stalwarts; the new conditions are producing independents. It is no longer a shock to learn that our neighbor has changed his vote. The party is being called on like ordinary, commonplace institutions, to produce results.

**The Rise of Party Issues.**—The basic strength of a party in any section is due to its espousal of the business and social interests of that section. In the East the Republican party stands for protection. The great mineral resources of Pennsylvania for example have made that State a manufacturing and mining community. The protective tariff has encouraged, iron, steel, silks, woolens, carpets and all other textile manufactures, until the people of the State feel that protection is the corner-stone of their prosperity. So long as the Republican party stands for protection and the Democrats for free trade, the choice between the two parties is an easy one. The same holds true in lesser degree of the manufacturing interests of New York and New England. In the West, the farming interests have demanded a reduction in the prices of manufactured products, and have claimed that the protective tariff should be lowered in order to effect a lowering in the price. The farmer wants high prices for his grain and food-stuffs and low prices for the manufactured products which he buys. Nearly the entire agricultural section of the West supported, in 1912, the parties demanding customs revision.

In the South the race issue, caused by the 14th Amendment to the Constitution intended to protect the voting rights of the Negro, has permanently estranged the white race from the Republican party and allied it with the Democrats because the latter stand for white supremacy. A further example may be seen in the free silver movement of 1892-96. The farmers who had mortgaged their lands during the agricultural depression and who therefore wanted to pay their debts in the cheapest money possible, together with the silver mining interests, formed a combine of the Democratic and the Populist parties to agitate for free coinage of silver. This movement, if successful, would have had far-reaching effects, both economic and political. It died out because of the reviving prosperity of the western farmer. For many years the party politics of New England were controlled by the shipping interests of that district. On the Pacific Coast, the Chinese and Japanese race questions have always played an important rôle in determining party issues, the laboring classes demanding the exclusion of the Asiatic cheap laborer in order to protect the standard of living of

the white workman. In many States, the railway questions of the last thirty years have formed party issues in politics. The rates charged by the railways, the facilities offered to shippers, the discriminations between large and small shippers have all been points around which political agitation has centered. The party making the strongest bid for popular favor on each of these local issues naturally strengthened its hold on the community. In reality then, party issues are only questions of business, race or social condition, transferred to the field of politics.

**Rise of New Party Leaders.**—One of the striking phases of American public life is the complete resetting of the political stage in the last ten years. Not since the critical days of the Civil War has there been such a clean sweep of both men and issues as is now taking place. Undoubtedly its very completeness shows that we are entering a new era. What makes a new era? What is the real importance of a new leader? We like to think that all political progress is the work of great personalities who "create" new principles; we commonly say that Jackson suppressed Nullification, that Clay produced the Missouri Compromise between slave and free States, that Lincoln preserved the Union, that McKinley established the gold standard and that Roosevelt created our policy of government regulation, but history gives us a different and far more interesting view of the facts. What really happens is that the gradual shifting of conditions produces some great new need which is at first only dimly felt by the people and their leaders. Slowly it grows until some politician with both courage and foresight arises and boldly champions the new idea, regardless of immediate consequences to himself and his party. The "idea" becomes an issue, and the politician a leader. He does not create the new thought nor is he the sole cause of the new situation, but his clearness of vision, strength of purpose and close touch with the people enable him to see the need of the hour, to make it an issue and to lead a political movement for its success. Lincoln did not invent a new idea; he saw, with the eye of a prophet, that the slavery issue could not be compromised. The whole territory of the nation must be either slave or free. He became the political leader of the nation, by grappling with the master-problem of his time and demanding its complete and radical solution. McKinley did not establish the gold currency. When first nominated in 1896, he was inclined to avoid the issue. But becoming convinced that there could be no compromise he enlisted with all his energy and enthusiasm in the educational campaign for the gold standard. Roosevelt was not the first to suggest a strong Federal regulation of corporate affairs, but at a time when popular thought was chaotic and unformed he grasped this solution firmly and by his wonderful genius in guiding and molding public sentiment, he led the way towards a solution. No one doubts where our presidents stand on any important problem. Our new leaders in all parties

to-day have less desire to "wobble" and to please all men by compromise, and more willingness to face rather than dodge an issue. We are developing a more straightforward and forceful type of politician because our political questions require more positive action.

**New Issues.**—The natural line of division between parties where unfortunate racial or religious issues do not enter, is between the conservative and the advanced or liberal-radical groups. This has proven true in the long run of all the great parliamentary parties of the world. Among the conservative group are usually found the bulk of the landowners and their adherents together with the representatives of large corporations, a great section of the middle class which is naturally conservative by environment, and many farmers. In the radical-liberal class, the small storekeeper, the working class, and the small farmer usually form the backbone of the organization. Parties never divide solely and exclusively along these lines, but an examination of party history through a long period shows this to have been the main line of cleavage. In America up to about 1890, the Democratic party represented the more conservative element. The Republican and its predecessor, the Whig party, had presented advanced progressive doctrines. The Democrats had been strongly influenced by the long line of statesmen who held to the strict construction, exclusively legal, view of the Constitution and objected to the growing power of the National Government. This States' rights theory of the Democrats was essentially a conservative idea. The new Republican party had thrown itself heartily into the battle for protection, and even for the use of force against the States, to maintain the national union. This latter doctrine, while conservative in theory, was drastic and radical in effect. The Republicans were everywhere regarded as the advocates of new and advanced ideas and principles of government and were closely allied with the new manufacturing industries of the North and East. It is interesting to see how this alignment has now changed completely. The success of the protective policy led to the growth of immense manufacturing, transport, and banking corporations whose continued prosperity the Republican party espoused. This was a conservative tendency. But the development of these interests produced such glaring inequalities in wealth and created such a large class of industrial laborers clamoring for a greater share in the distribution of the new wealth created, that it speedily became essential for all political parties to recognize and attract this new class. This became a disturbing radical force. Meanwhile a period of great agricultural depression had set in and the small farmers demanded relief from the high prices attributed to the protective tariff, as we have seen. The Republicans sought to hold the industrial laborers by claiming that a vote against protection was a vote against industry, and in this they were successful for many years. Meanwhile the Democrats succeeded in holding the South through the race issue



and in winning a large section of the farmers through the issue of high prices. This division of parties soon became a standard, recognized feature of American political life. In the long run it could not continue, however, because neither party could indefinitely appeal to the two conflicting elements which both contained. The Democrats were the first to disintegrate. The radical element, demanding closer attention to the needs of the small man, soon got the upper hand and under Mr. Bryan held the party machinery for several elections, in which, however, it was defeated. Then came the turn of the Republicans, the insurgent movement culminating in Mr. Roosevelt's championship of the radical-liberal cause, also produced a split which as we have seen brought the party to defeat in 1912. In the meantime the Democratic reorganization had been proceeding slowly and the radicals under Mr. Bryan reasserted themselves in the nomination of Mr. Wilson, while the Republicans, chastened in spirit, are making great concessions in principle to win back the radical element to the fold. It is clear that we cannot have two radical nor two conservative parties. Undoubtedly the immense majority of the voters have now definitely and finally accepted a general policy of government, on business and social questions which ten years ago would have been considered dangerous if not subversive. Undoubtedly also public opinion is still favorable to further regulative action and has set its face against the policy and leadership of the older, reactionary element in both parties. But not all Americans are radical or even advanced liberals. There is a numerous and influential class of our people who are deeply and permanently hostile to the whole plan of regulation, and who emphasize the preservation of property rights. It would seem natural, therefore, that in the course of a few elections one of the major parties should become finally fixed as a conservative force, while the other casts in its fortunes permanently with the radical element. We are in the midst of a break-up of old party differences, a shifting to new issues and a division along other lines of cleavage.

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#### QUESTIONS

1. Secure by letter to the Secretary of the State committee of either party in your State the following information:
  - (a) How many delegates is the party in this State entitled to in the National Convention?

## (b) How are they chosen?

2. How is the national committee chosen and why do candidates for the party nomination seek to control the committee?
  3. What is its exact power over contesting delegations for seats in the convention? Why does a candidate try to secure control of the committee?
- Example.
4. How are funds raised for Presidential elections?
  5. What are the other powers of the committee?
  6. Who calls the national convention?
  7. How are delegates apportioned among the States?
  8. Explain how the apportionment system makes trouble for the convention and the party.
  9. How could the system be improved? How have the Republicans changed their apportionment?
  10. How are the delegates chosen?
  11. Explain the chief features of the New Jersey Presidential Primary Act.
  12. What are the defects of the Presidential primary?
  13. What do you consider the main work of the national convention?
  14. Explain the influence of office-holders in the convention of the majority party.
  15. Outline the usual order of business of the convention.
  16. Explain the importance of the choice of the chairman.
  17. Describe the practical methods now employed to impress the delegates with the popularity of a candidate.
  18. What is the work of the committee on credentials?
  19. Explain Mr. Bryan's influence in nominating Mr. Wilson.
  20. How can a delegate have half a vote?
  21. What is the Unit Rule and why has it fallen into disfavor?
  22. Explain the methods followed in the preparation of the platform.
  23. Explain the guiding principles followed by the leaders in selecting the nominee for Vice President?
  24. Give your impressions of the usefulness of the national convention.
  25. Resolved that each party should nominate its candidate for the Presidency by a preferential primary system. Take either side.
  26. How is the State committee chosen? Is it the real or nominal authority in the party and why?
  27. Explain its chief powers and duties?
  28. How can it suppress independent tendencies in local divisions of the party?
  29. Are candidates for State offices nominated by convention or primary in your State?
  30. Outline the city, ward and district authorities of the party.
  31. What are the powers of the ward committee?
  32. Who does the work of getting out the vote?
  33. How far are the various committees held to strict accountability for the funds which they handle? Have you a campaign fund publicity law in your State?
  34. Explain the methods used in getting the voters registered and voted.
  35. Explain the point of view of the leader in his conference with the members of the committee.
  36. Why do men of intelligence often submit to objectionable leadership in the party organization?
  37. Visit a political club and report on its constitution, by-laws and the social and political features of the club.
  38. Explain how party platforms and business and social interests are connected. Examples.
  39. Why have so many new leaders and new issues come into the political arena in recent years?

40. Give your impressions of the influence of personality and of business and social conditions respectively in the rise of party issues.

41. Why are positive leaders superseding the older, issue-dodging type of politician?

42. Resolved that I can secure greater progress for the community by submitting to the rules and leaders of the two older parties. Defend either side of this question.

43. Prepare an essay on "The Real Value of the Party to the People."



## CHAPTER XXVII

### PUBLIC OPINION

If we scratch beneath the surface at any point in our government we come upon "public opinion." The Acts of Congress, the orders issued by the President, the decisions of the courts, are only the results of this force, they are the mere surface of our political life. Underneath all these is the real, vital power itself. How does this opinion arise? How is it expressed? In what way does it act? The answer to these questions shows us some of the most interesting features of our political system. Next to the press, the chief means of organizing and influencing American public sentiment to-day is some association or society.

**The Private Association.**—Here we find the prime difference between the politics of the Teutonic and other races. The Teuton and especially the Anglo-Saxon, is given to tolerance and co-operation with his fellowmen in every department of life. "Team-work" is almost instinctive with him, he organizes clubs, committees and societies and devotes himself to their purposes with a readiness, skill and persistence that mark him as a special race type. Whether it be in affairs of the church, the shop, or the athletic field, the Saxon has through long centuries developed traditions and habits of joint action. In doing so he has become the master politician of the world. A race which can co-operate, can govern itself, for self-government is team-work transferred to the field of politics. Team-work means that each man is willing to submit himself to the welfare of the whole body, that he controls his personal likes and dislikes enough to submerge them in the common effort for a common good, that after many trials he has learned to discuss with some tolerance, moderation and fairness the problems of his group, and has formed *the habit* of steady, concerted effort. Other races have greater enthusiasm and intensity of spirit, brighter flashes of genius, and higher inspirations of artistic taste,—the Saxon has the ability to work with his fellowmen. He is not an inventor of brilliant political theories but is blessed with that humbler yet rarer gift of making theories work. Bryce has well said that we have not a great political system but a great ability to work a poor system.

In America group action by associations, both business and civic, is more widespread than in any other country of the world. The purposes and number of such associations are legion, but certain of them exert such a strong influence on government as to deserve special mention:—

1. Trade and business associations, e. g., the National Association

of Manufacturers, the National Grange of Patrons of Husbandry, the American Bankers' Association, American Publishers' Association, American Federation of Labor;

2. Those intended to promote social progress and the improvement of economic and social conditions, e. g., the National Child Labor Committee, the Public Health Association, the National Conservation Congress, the National Education Association;

3. Those concerned with the improvement of our government, such as the Short Ballot organization, the Bureau of Municipal Research, the Direct Legislation League, National Municipal League.

Without exaggeration it may be said that these associations develop and guide public opinion on every important question in their respective fields. If tariff legislation is to be passed in Congress each important manufacturers' association in the country informs its members and asks their active interest and support in influencing the new bill. It also sends a representative to Washington. If the bill be one affecting the currency or the financial conditions of the country the American Bankers' Association, the State Associations of Bankers, or the various bank Clearing Houses and Boards of Trade of the large cities send committees to urge their views. So systematic has this work become that every large business association now has its legislative committee whose duty it is to oppose hostile bills and especially to bring to bear on new lawmaking the full force and influence of its membership.

**Expert Service.**—A prominent feature of the business or civic league is its employment of experts. When the bankers sought to win the country to a central bank plan they secured research specialists on money and currency, on credit and on banking organization. These men brought to the report of the National Monetary Commission a full knowledge of such problems both here and abroad. When an industry is to be unionized or a strike conducted against heavy obstacles, the American Federation of Labor and the special trade union involved, send their strongest, most experienced organizers upon the scene. When a serious labor dispute threatens the member of an efficient employers' association, that body hurries to his aid a skilled and seasoned specialist in labor troubles, who brings to bear the methods and resources born of many a struggle. When the members of a telephone or electric lighting combination are asked by a public service commission to show cause why their rates should not be lowered or their service improved they have at their command the best engineering, accounting and legal skill obtainable. So great is the advantage which they enjoy in this respect that in 1914 the principal cities of the country established the National Bureau of Municipal Public Utilities Research, a body designed to create a permanent staff of experts on public service rates, services, and similar problems, and place them at the disposal of the cities forming the bureau. This would greatly strengthen the cities in question in hearings before the State public service commissions.

When any associations such as those above described seek to influence legislation, they present a measure drawn by the best technical ability available. Whether the effort be to amend the national tariff or to improve the local school administration the change is drafted by "a man who knows." It is this element of professional service in our opinion-guiding associations that has lifted them to their present importance and usefulness and given them their positive and constructive features, which we shall consider later. In addition, all the larger bodies have a professional secretary. He usually edits a periodical, magazine or publication for the society, secures new members, and devotes his time to its propaganda and purposes.<sup>1</sup> We shall consider the practical work of some of these organizations.

**The Woolen Manufacturer.**—One of the most efficient bodies in molding public opinion is the National Association of Wool Manufacturers formed in 1864 for the double purpose of supporting the protective tariff and of diffusing information about the industry. The Association publishes a quarterly bulletin containing articles on the technical sides of the business and explaining proposed legislation which may affect the industry. An excellent instance of this is the special tariff number of March, 1909, and that of September, 1910. This bulletin is sent regularly to all members of the Association, to other manufacturers in the industry and to a selected list of influential newspapers, also to college and public libraries. Whenever a notable address or argument bearing on the industry appears, it is published in the bulletin and republished in pamphlet form for wider distribution. Often thousands of such copies are sent to the press, to public men and business men in all parts of the United States. One of these is entitled "What are the Protected Industries?" and is designed to show that farming and similar occupations profit quite as much from the tariff as does the manufacturer. When a revision of the tariff is proposed the association carefully prepares a brief for the wool manufacturer, which is drawn up and presented by a special committee representing all branches of the industry. This brief is placed before the Committee on Ways and Means in the House of Representatives and the Senate Committee on Finance. The care and thoroughness with which these are prepared have made them models in form and have even led to their publication by Congress. They are also printed in the bulletin and in pamphlet form and are sent broadcast to the members and to leaders of public opinion. It is a significant fact that aside from the merits of the controversy between the Association and the low tariff advocates the woolen schedule of the tariff has been kept at a higher point than that on most other industries. But the influence and activity of this association are not limited to times of emergency; scarcely a week passes but that

<sup>1</sup> These secretaryships offer positions for which College men may well prepare themselves. Many of them are well paid, the salaries running from \$1,500 to \$6,000; a few even higher.

some statement is given to the press concerning the industry or some expression of opinion of its members as to public policy. It is not easy to measure the exact influence of this constant and systematic effort, but judged by its practical results the influence must be strong.

**The Farmer.**—For many generations the farmer has been inadequately represented in public life and elsewhere, because his industry is not well organized. The National Grange of Patrons of Husbandry was established to remedy this defect and to make the influence of the farmer felt in national legislation and other fields. The Grange is divided into State Granges which hold local meetings in various sections of each commonwealth and discuss a wide range of topics, both technical and political. The selection of subjects for discussion at these meetings determines largely the thought of the agricultural community on questions of public policy, and an expression of this thought by representatives of the Grange is in the best sense authoritative. Let us examine briefly some of these discussions and their effect on public opinion.

The National Grange is interested primarily in such questions as the tariff, railway rates, grain elevator charges, etc. The State granges take a more active interest in technical questions of farming and in the State laws to suppress the fraudulent competition with farm products. The manufacture of oleomargarine in recent years has reached an extent which interferes seriously with the sale of butter. Adulterated or filled cheese likewise threatens the farmers' interest as does the whole series of food adulterations which have become so prevalent in late years. The State Granges have at various times concentrated their attention upon these problems of competition and have aimed to suppress the sale of manufactured articles fraudulently labeled in imitation of farm products. The managing editor of the journal of one of these bodies writes: "The State Grange has done much as an organization toward securing and having enforced pure food laws. We have also fought all compromise with benzoate of soda, saccharin, and the like. We do our work through personal solicitation, personal letters to legislators, memorials and petitions. We build sentiment by having matters discussed in our Grange meetings, 1,700 of which are held every year, participated in by nearly 100,000 men and women." It is not too much to say that the Grange molds a decisive public opinion on all the legislative questions in its field.

**The Labor Interests.**—The American Federation of Labor, representing the great majority of organized labor in the country, is constantly on the watch to push favorable laws in both national and State legislatures. It has a membership of over two million, and publishes a monthly journal, *The American Federationist*. A paid president and secretary devote their entire time to the interests of the organization. It has also 1,100 organizers stationed throughout the country for the purpose of strengthening trade union sentiment

and organizing new unions. The Federation itself unites all the leading unions of the country, except the railway brotherhoods, in its annual convention. It is therefore pre-eminently well qualified to speak for the interests of the organized wage-workers. Typical instances of its constant effort to secure favorable public opinion and guide legislation are to be seen in such plans as the revision of the Sherman Anti-Trust Act in order to exempt from the law all labor combinations, so that the unions could legally conduct a boycott in interstate commerce. It has also asked a radical change in the method of granting injunctions by the courts, and a jury trial for persons accused of violating an injunction.

The methods pursued by the Federation in pushing these claims before the public are interesting. The monthly *Federationist* is replete with arguments on all of these points. The various unions composing the Federation in their publications also direct attention to these problems, the speeches of union officials are well calculated to unite the labor interests in these demands and finally, a committee on legislation composed of several leaders in the Federal executive council has been appointed and has steadfastly brought to the attention of legislative committees in the House and Senate the demand for a change in the national law on the points mentioned. This committee at first received but scant consideration from the Senate and House authorities, but formulated its demands in a brief circular and distributed them to all persons who might be interested. Still finding its demands unheeded, it approached directly and publicly the platform committees of the two national parties and in 1908 its demands were accepted by the Democrats and partially recognized by the Republicans. The Democratic majority in 1914 finally embodied them in the Clayton Act and the passage of that law brought to a victorious culmination the nationwide effort to create a favorable popular sentiment. Although the progress of other parts of this movement has often been blocked both by its friends and enemies, there has been a steady growth of public sentiment in favor of the more substantial demands made by the Federation and this growth is to be ascribed chiefly to the efforts of that body in molding public opinion.

**The Employer.**—Another good illustration is seen in the employer's attempts to present to the public his arguments against changes in the labor laws of the country and to safeguard his interests against possible excesses of labor sympathizers and against mob violence. An extensive series of employers' associations has been formed for this purpose. Prominent among these are the National Metal Trades Association and the National Association of Manufacturers. In both of these and other bodies the members are frequently addressed from headquarters on problems of public policy affecting their interests. In March, 1911, in connection with the opening of Congress a typical letter of this kind was mailed to members by the President of the Manufacturers



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"In view of these possibilities, 'not overstate, will you not make it

"1. To personally see your repr cannot personally see him, impre he be a Democrat, with the impc his influence to secure the appo as that of Labor and the Judiciary likelihood of the appointment, espe mittees, of members likely to repr bidding.

"2. Please request other busines like action, in person or by letter.

"3. Direct a note on these lines your Ways and Means Committee ' your communication."

The association above mentione means of solidifying and strengt among the employers and although antagonism from the labor union ra it must be recognized as one of the i expressing public opinion in its folc action.

problem of appointment with great care and drew up a new plan based on the merit principle. They were laughed at as dreamers and "mugwumps." But other associations were formed in various cities and these soon united in a National Civil Service Reform League which continued the agitation of this important governmental problem until the newspapers and magazines of the country were one by one interested and drawn into the discussion. In a few years most of the thinking people of the nation were being educated on the subject and were expressing their views in unmistakable terms. The League drew up a bill which was presented by a member of Congress favorable to the new plan and all the local associations urged their Congressmen to support the measure. When in 1883 the pressure finally became irresistible, the Act was passed. Public opinion had been formed and had triumphed. Such is the history of the United States Civil Service Act. Equally interesting is the work of the various Child Labor Committees in all the industrial States of the Union. The blighting effects of Child Labor in our factories and workshops have been seen for years, but it was not until the National Child Labor Committee, in co-operation with the Committees in each State began to bring strong pressure to bear upon the States and National Government and upon the public, that the question received the attention which it deserved. Public opinion was crystallized and every manufacturing State in the Union has now passed or is considering the passage of a law prohibiting the labor of children under fourteen in mills and factories.

**Molding Opinion on the Currency.**—After the panic of 1907 there was a general demand that the currency of the country be established on a more elastic basis. It was especially desired to provide an abundant supply in cases of financial stringency. In order to secure such an improved plan Congress established the National Monetary Commission in 1909. Under the chairmanship of former Senator Aldrich this body immediately studied all the most effective currency systems of foreign countries, and with expert advice formed a plan whose main feature was a concentration of banking or credit resources, so that all the local banking associations could be furnished with sufficient funds, in time of emergency, to tide over the monetary stringency and thereby render the whole credit system more elastic. The adoption of such a feature appeared to be an almost impossible feat in 1909 and 1910 because of the deep-rooted popular suspicion against Wall Street influences, and against any concentration of banking resources which might fall under those influences. The people believed and with reason that speculators were able to obtain the money of the banks for gambling purposes, largely because of the centralization of credit in New York and the favor shown by large banking interests to the speculative element. They therefore suspected that any central bank system which involved a further concentration would naturally aggravate the evils of speculation and of Wall Street control over the country's funds. The problem

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in the short session. This time is fully taken up by the large appropriation bills for the executive departments, and in the completion of left-over, unfinished business. Those who are seeking the passage of new measures therefore have their bills introduced and pressed at the long session. In the State legislature there is only one session.

The attitude of the Senators and Representatives from the association's sections of the country deserves mention. Any Congressman or legislator will introduce almost any bill on request of one of his constituents, but if he does not care to push it actively, he readily avoids responsibility for the measure by saying that it is presented "by request." Thousands of measures are annually introduced with this fatal tag attached, fatal because no one takes any further interest in a bill so labelled. As we have seen in a previous chapter the chances are all against the passage or even the consideration of any measure which is not pressed by some strong influences in the electorate. The association's next step is to secure the services of a "legislative agent." Public sentiment against the lobbyist has always been strongly hostile because of the secret and often nefarious methods employed by him. Some States have even prohibited "lobbying," as it is called, in their legislative halls, but more recently the tendency is to regulate the practice and surround it with certain safeguards of public registration. The legislative agent is usually a lawyer and often a former member of Congress or of the legislature who is therefore familiar with its procedure, and with many of the leading personalities on the floor. The rules permit former members to enter the hall and confer with the members. The bill, having been introduced by some friendly legislator, under the direction of the agent, is then referred to committee. This committee would ordinarily allow the bill to die without further consideration, because the members are all interested in measures of their own or in some important political bill which affects the success of their party. They have little time nor disposition to consider other matters. At this point, the services of the legislative agent become invaluable. He sees influential leaders, the principal members of the committee, and tries to secure a hearing for the friends of the bill. If he can persuade the committeemen to do so, a date is set and the persons interested in the measure then appear. There are grave dangers for the bill at this hearing, the most important of which is that its own friends will kill its chances by talking too much, by answering questions indiscreetly and by giving conflicting views at the hearing. The legislative agent must select with great care the witnesses who are to appear, and he must see to it that each witness gives his testimony in condensed form. Simple as this may seem, it is one of the hardest tasks confronting the lobbyist. The average business man appearing before a law-making committee is "flustered." He makes a bad impression, his nervousness and inex-

and outspoken opposition  
which is not always possible.

If the bill passes the committee report, it must next run through the parliamentary ability into full play. He must support it well as its friends. He must propose amendments, and ward off the measure has been guided through the second and third readings where the same general plan is followed. This short description of his agent, if successful, amply essential as are those of the agent that many large corporate interests have taken to the whirlpool of uncertainty, prefer to make terms that can easily do in the State government necessary orders for the passage.

**Special Need of Organization**  
It is clear that public opinion could be a strong undercurrent of feeling. Through addresses, mass-meetings and can win permanent recognition by some practical organization of the business association or brings into coherent, definite sentiment, and by organization.

with measures which are so difficult if not impossible of execution that the executive must *select* the laws to be administered. In this general competition among laws, those receive the most attention which are backed by the force of an *expressed* public opinion. The business or civic association makes this opinion felt. If the laws on health, schools or roads are administered with laxity the county medical society, the public education association or the motor club learns of it and brings pressure to bear upon the State executive. And the law is enforced.

**How Civic Associations Set the Pace for Government.**—This brief description of the work of business and civic bodies shows what service they render in making government worth something to the people at large. But within recent years they have entered a newer field of activity which has now made them an indispensable part of our system. Until a short time ago the civic and good government clubs were mainly critical, they pointed out weaknesses and defects, inefficiency and dishonesty in government. To-day they are positive and constructive, proposing and suggesting plans of public action. A criticism or protest is negative, it stirs up popular indignation and often leads to an explosion of popular wrath in an election, sweeping out of office the majority party and all connected with it. But an explosion is destructive, and no successful system of government can be built on indignation. Following the outburst of popular wrath there must come the slow, painstaking reconstruction of the political or social system, otherwise the old abuses quickly reassert themselves. The *permanent* reform movements of political history have all had this positive character. The English Revolution of 1689 destroyed the doctrine of the Divine right of kings but put in its place the positive idea of government by the Parliament. The American Revolution abolished British sovereignty over the Colonies but it was incomplete until it was followed up by the formation of a strong national government in 1787. The British Reform Bill of 1832 not only ended the control of the "rotten boroughs" over Parliament, but it set up a political control by the middle classes. The destruction of Negro slavery in America was successful only in so far as it was followed up by the industrial training and education of the Negro. Always there must be this positive element of constructive progress, otherwise a reform becomes a mere paroxysm of blind anger. The constructive efforts of our business and civic associations, in developing new solutions of public problems and proving their practical value, have now assumed prime importance in government. Instead of denunciation, the club or league now devotes its time to the planning of new measures. By this changed attitude the society has gained stronger and more permanent support for its plans and a more practical result than it could have reached by an appeal to indignation. The strength of the new system lies in its practical appeal and in publicity. When a public

official is now told by an association that its experts have studied conditions with care, and have worked out some proposals for improvement, he must either adopt the new proposals or bring out another plan. He cannot openly oppose all change. Some idea of the strong influence of this factor upon legislation may be formed from the following partial list of important public measures or policies which have been drawn up and are being urged by private business or civic associations:—

1. *In the National government:—*

Internal water ways,  
The Civil Service,  
Restriction of immigration,  
Regulation of interstate and foreign commerce,  
Treatment of Indians,  
Treaties of arbitration,  
Settlement of labor disputes,  
Forestry,  
Irrigation.

2. *In the State government:—*

Revision and enforcement of the tax laws,  
Establishment of new system of public charities,  
Reorganization of prisons,  
Forestry protection,  
Road improvement,  
Improvements in school administration,  
Health protection,  
Restriction of child labor,  
Regulation of liquor licenses,  
Inspection of foods.

3. *In the municipal government:—*

Parkways, boulevards and park areas,  
Recreation grounds,  
Reorganization of city school systems,  
Medical inspection of schools,  
Manual training methods, nature study in the schools,  
Extension of library systems,  
Reorganization of the tax laws,  
Adoption of business methods in the granting of franchises and in the award of contracts,  
Suppression of grosser forms of gambling and vice,  
Establishment of modern accounting methods.

**Experimental Work.**—In some of the larger cities, societies have not confined themselves to the simple proposal of plans for government action but have placed these plans in actual operation with the aid of private funds, have demonstrated the feasibility of the proposed improvements and have then turned over the material, plant and experience thus gained to the municipal authorities.

Our public baths, playgrounds, vacation, sewing, singing and

cooking schools, our investigations of the proper method of treating tuberculosis and some of the most valuable phases of social work, are all examples of private experiments which first demonstrated their ability to produce results and were then handed over to the city government. Such private associations have undeniably "set the pace" for our public machinery, and in doing so have opened up a new method of work whose value is hard to overestimate. This activity is not a simple expression of public opinion; it is a demonstration of what can be done and what should be done by our governments to improve the individual welfare.

The besetting sin of modern governments is a constant tendency towards the stagnation of routine work—the hostility to new ideas. At this point the experimental activity of the private association steps in to show what is and what is not feasible. This experimental activity is yet in a most primitive stage. Its possibilities are not clear even to those who have done most to further its growth. Independent experiments and investigations supported and conducted by private societies may be undertaken in nearly all the new fields of work now devolving upon public government. The strongest obstacles to progress are the official "dry-rot" just described, and a widespread popular disbelief in the *possibility* of improvements. But if it can be shown by actual demonstration that the government can be made more useful and helpful, and if private means are devoted to a series of experiments to discover the best methods of administration, these obstacles are removed.<sup>1</sup>

**The Democracy of the Newer Methods.**—One serious danger threatens the public utility of the work just described. Many civic societies are unintentionally aristocratic in character and methods. They do not reach out to include all classes of the people in their membership. Composed of the more advanced and educated classes and acquainted with the latest developments of science and the useful arts, they sometimes demand public policies which are not fully understood by the majority of the voters. In such cases the society or club may be unquestionably right as to the benefits from its proposed measures, but it makes the mistake of taking for granted a popular support and sympathy for such measures. Such support must be created by the efforts of the society itself.

No amount of temporary good government can compensate for the decline of an active public opinion among the masses of the people. From the ousting of the Tweed Ring in New York by a Citizens Committee and the Philadelphia Gas Ring by the Committee of One Hundred, down to the most recent events in city

<sup>1</sup> Until very late years our progressive philanthropists have given their money for simple "charity" but recent gifts show a broader grasp of the situation, and new ideas are being worked out in such widely separated fields as technical education, workingmen's dwellings, transportation, the diffusion of new immigration, city planning, public sanitation, etc.



attention must be drawn to the desirability of new measures. . . . good government must be advertised. . . . must therefore conduct an advertising process of education be left untrammelled. **No manufacturer or merchant, his customer prepares to purchase, spent in advertising to develop ideas to those who have no notice in society, to achieve a substantial change, large part of its energies to the people in civic improvements. work to be wholly or even principally abuse, the dismissal of a particular a certain candidate for office, or law, it has mistaken the very nature under American conditions. The movement followed by a discouraging result. associations are now following the path pursuing accepted commercial methods.**

**How the Business Association** . . . is the above summary of the work of the societies it suggests how completely influencing government action have in recent years it has been customary quiet "understandings" and "arrangements" interests and organization leaders contribute to the campaign for financial reform.

is being abandoned. Nearly every great industry of the country is now coming directly before the people and seeking their approval and support in its relations with the government. In giving up the old fashioned political deal with the majority party, and in seeking to cultivate a favorable feeling among the people, the modern business enterprise has forced government questions more into the open daylight and has greatly strengthened the influence of the executive in legislative affairs. He need no longer depend solely upon his party organization as the thermometer of popular feeling, but he enjoys a growing freedom to reach over the heads of the party leaders and go direct to the people themselves, relying upon the work which has already been done by private associations to form, stimulate, guide and express popular sentiment. Whenever the President, the Governor or the Mayor finds himself fettered and obstructed by secret influences within his own party he also finds that his main reliance in appealing for popular support, is the activity of some business or civic league. These bodies now wield a power of unlimited possibilities for usefulness.

**The Manufacture of Public Opinion.**—No public opinion endures unless it is organized, but this by no means implies that public opinion can be manufactured by a simple process of organization. Many energetic advocates of some "Cause" make this mistake. Seeing the successful results of strong and influential "machinery" directed along effective lines, these persons fondly imagine that by establishing a new Society or League, electing officers, and inviting the public to membership, they can then turn on the printing press, grind out a few thousand petitions and resolutions to be signed and circulated through the mails by wholesale, and ultimately foist these upon the legislator or congressman as genuine expressions of a profound and widespread public opinion. It would be invidious to mention by name associations of this sort but the country is honeycombed with such bodies. They are usually composed of a nominal membership, with figurehead officers, and an uninterested executive council of "prominent citizens." The chief assets of such paper organizations are usually a paid secretary, a typewriter, a large supply of postage stamps and the use of the mails. Such investigation as has been made seems to show that they are fruitless unless they represent some genuine popular feeling. The Washington correspondent of a great metropolitan daily has well said "There is little use to attempt to mold public sentiment unless there is a real demand for something." Says a member of Congress: "The mails are loaded down with prepared postal cards and circulars, protesting against this or demanding that, which are sent to citizens throughout the country with the request that they sign them and forward them to Washington. Frequently a member of Congress first learns of a movement to manufacture public opinion by receiving hundreds or even thousands of such postal cards and circulars signed presumably by his constituents,

but in many instances signed without reading or at least, without consideration, merely because a request has been made that they sign them. The great public are apt to comply with a request to sign a petition, especially if the request is made in writing and costs nothing." From all the evidence we must conclude that the work of an association is not so much to create an artificial sentiment which does not exist, as to educate, make definite, pointed and effective those beliefs and opinions and desires of the people which have a solid basis in business or social advancement.

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#### QUESTIONS

1. You are explaining to a foreigner the relation between public opinion and Federal laws, presidential orders and acts and court decisions. Summarize your explanation and give examples.
2. Which do you consider the two most important means of influencing public sentiment in this country? Illustrate by a case known to you.
3. What are your impressions as to the chief political characteristics of the Teuton as contrasted with other race types?
4. Prepare a report or summary of the constitution, by-laws, purposes and results of some association of business men.
5. Of some society to promote social progress.
6. Of some organization for the improvement of government.
7. Outline and explain the growth of the civil service idea into a national law.
8. Explain fully how the woolen schedule of the National Tariff Act has usually been kept at such a high level.
9. What has the farmer done to strengthen his influence on legislation?
10. The workingman?
11. The employer?
12. How was popular opposition to a concentration of banking control modified before the passage of the Act of 1913?
13. Prepare a report on the methods of organizing and conducting the woman suffrage movement in any State.
14. Explain how business and civic associations make use of expert service in their affairs and give examples.
15. What are your impressions as to the exact advantages of this plan?
16. If the roads in your section of the State were in very poor condition what would be the most feasible method of securing their improvement?
17. In a city of 500,000 the public school system has not grown along with the needs of the community. The funds are not used to advantage, the teachers are poorly paid and a large number of children are not enrolled. Also the school laws of the State are defective. A number of prominent citizens propose to hold a series of indignation meetings and accuse the school officials of incompetence and graft. What would be your suggestion? Outline fully a plan of action.

18. Summarize the main points of your speech at a meeting, showing the reasons for your proposal.

19. In a discussion on politics the argument is advanced that it is better for the business man to attend to his business and allow politics to be managed by politicians. You desire to show in answer, that the politicians promote the general welfare best when they are carefully guided by business and civic associations, and to this end business men must take an active part in such bodies. Outline your argument with illustrations.

20. In a large city there is some demand for the teaching of cooking and sewing in the girls' schools but the authorities claim that neither of these subjects can be taught by class work. How would you put the plan through?

21. In a modern industrial community a millionaire has let it be known that he will devote a certain sum of money to some public-spirited enterprise. A number of persons are about to call upon him asking for funds to endow a soup society. You are chosen to present to him the claims of the civic club which wishes to establish an experimental plan of technical education which, if it succeeds, will be turned over to the city. You arrive after the soup society advocates have made their plea. Present your case.

22. The civic club of your city is run by a few public-spirited citizens of intelligence and patriotism. Its membership is 100. It has a complete and well-planned program of city improvements which it desires to urge upon the city government. At the annual meeting it is proposed that all the members visit the city officials and insist upon the adoption of this program. This is the only provision made for its execution. Summarize your speech on further measures.

23. What are your impressions as to the possibilities and advantages of greater publicity in government through business and civic associations?

24. Write to your congressman or representatives in the State legislature and ascertain from them their impressions as to attempts to manufacture public opinion by mechanical methods. Prepare a short essay showing a successful and intelligent system of molding opinion as used by some association and contrast it with some plan of manufacturing sentiment which does not exist.

25. You are engaged in a business which is subject to national legislation. It is proposed to change the laws governing your industry in a way which would injure your interests, and you wish to offset this by securing the passage of a different law. Prepare a full, complete statement of the various steps to be taken in order to realize your purpose, with the reasons for each.

## CHAPTER XXVIII

### THE CIVIL SERVICE

**The Problem.**—The real civil service question is—how to secure and hold an efficient staff of government workers, *in all positions*; in other words, how to make the service a career for men of conspicuous ability. Thus far we have only scratched at the outside of this problem with our civil service laws, and we have yet to face the substantial issue involved which is to create a new profession of the highest usefulness and patriotism. This includes: The present efforts to free the lower clerical force from the blight of oppressive partisanship, by entrance requirements, and by rules protecting admission to and dismissal from clerical employment;

The establishment of effective service records by which promotions may be made on the basis of merit rather than upon the paralyzing principle of mere length of service alone;

The complete abandonment of the present policy of making heads of offices, division and bureau chiefs, political appointments; The extension of the merit principle to these posts, the opening up of opportunity for "employés" to be promoted to "officials" and the stirring up of ambition among the hundreds of thousands of clerks who at present have little or no incentive to do more than a minimum of work sufficient "to hold their jobs;"

The adoption of a moderate pension system which will at least assure to those who have served the government faithfully and well, that they will be taken care of when incapacitated;

The complete readjustment of salaries in the technical and intermediate positions, to afford a more reasonable return to those who carry the real burden of public work;

Finally, but not least, the education of all classes of the public to see in the public service not "a plum" but a business organization. Such a viewpoint does not become an important or popular one until the work of the government itself is important.

**The Transition from the Spoils to the Merit System.**—As long as government activity did not closely touch the people at large, there was no interest taken in the formation of a strong, well organized civil service. The old maxim "to the victors belong the spoils" meant that with each change of party control the entire national government service must be reorganized with a new staff in order to find places for the victorious party workers. This plan, known as the spoils system, was introduced by Andrew Jackson in 1829 and from that time until 1883 the Federal service was subjected nearly every four years to a paralyzing convulsion called a

"cleanout." Since a public office was a chance to reap a good salary with little work, it ought not to be monopolized by a few; in a democratic country the offices ought to be passed around,—“rotation in office” was the policy. It mattered little which party won, there must always be a sweeping change in the appointed offices to make room for a new set of men. Furthermore each new body of office-holders was chosen as a reward for political efforts, not for business ability; accordingly the standard of government efficiency was low, embezzlement frequent and the public service became a by-word for incompetence. This was the situation when thirty years ago the growing powers of the government began to suggest the need that the official service be placed on a business basis. The result of that belief is the “merit system.” Its central idea is that appointments should be made according to ability, the less able and the less desirable applicants should be weeded out by an examination. At first the new idea was hailed as the cleanser of the Augean stables of politics; such expectations could not possibly be fulfilled. But as the claims of its advocates have become less extravagant a more abiding faith in the system has been aroused. After many unsuccessful efforts to establish a practical method, the present national law was passed and approved on January 16, 1883. Since that date the movement has been making gradual headway and is now in force in several State and city governments. In its report for 1912 the national commission says:

“Of the whole number of public employes in the United States—Federal, State, county, municipal and village—not far from 600,000, or nearly two-thirds of the entire number, are withdrawn from the spoils system and appointed upon a merit basis, under laws intended to regulate and improve the public service.” The number of State positions is still comparatively small, but in the Nation and the municipalities there is a wide scope for the operation of the merit principle.

**Obstacles to the Merit System.**—The greatest obstacle to the universal adoption of the merit principle is the need of rewarding those who bear the burden and heat of the day in party work. As long as a large proportion of the voters must be persuaded to perform their duty there must always be some group of men in every locality who will form the nucleus of a party organization, and who will do the detailed work of party management and “getting out the vote.” These men may be temporary volunteers working from patriotism, or they may be regulars, pursuing politics as a permanent calling. The latter are the more efficient. The atom of all party molecules is the division or precinct worker. There are from two to a half dozen of these to every polling place. The more important workers are placed upon a committee which governs the party organization in the ward or district. The district or ward “leader” is elected to a city committee, which controls the entire local organization. The leaders and the members of the various committees

include all the important party workers in the city. Each of these party workers occupies a public office in the local or National Government, with a salary proportioned to his importance in the party. This proportion between political work and public office is shown in the following list taken from a large city: —

<i>Party Office</i>	<i>Public Office and Salary</i>
Precinct or division workers	Janitors, watchmen, messengers; \$600-\$1,000.
Precinct or division leaders	Clerks, inspectors of street cleaning, etc., \$800-\$2,000.
District (or ward) workers and leaders	Clerks, bureau chiefs and heads of departments; \$2,000-\$6,000.

The district leaders also have various sources of gain besides their official salaries. Undoubtedly all these party workers perform a public service for which they should be paid. But how, and how much? The kind of ability required of political workers is in demand everywhere and most of them would undoubtedly succeed better in business than they do in politics if they devoted the same amount of time and energy. While the official salaries of politicians seem high, a large portion is taken out in party and club assessments. The social expenditures of the workers are also heavy, for every worker has a host of "friends" and dependents, whom he must help. There is also the precarious nature of his employment which is aggravated by factional warfare within his own party, threatening to displace him at any moment. It must be remembered too, that political work soon destroys a man's fitness for ordinary business pursuits and thereby limits his possibilities in case he retires from politics. From all these facts it is clear that the average politician must somehow be paid a *net* salary which will be proportionate to the kind and amount of work done. The spoils system has flourished because it offers a means of paying such a salary. But the cost of the system to the community, in the incompetence, inefficiency and corruption of the public service, is too great a price to pay for the party worker, and it would be even better for the government to give a lump sum to each political organization for its expenses than to support its workers in public office. It is the necessity of finding some adequate means of paying for party services which retards the progress of the merit principle. Strong as this obstacle undoubtedly is, it is slowly giving way before the growing desire of the people that government work be placed upon the same plane of ability, thoroughness and efficiency as other business enterprises.

**The United States Civil Service.**—There are in the National Civil Service 411,000 positions; 260,000 of these are subject to the Act of 1883. The Act does not apply to the following class of civil servants:

1. Those appointed by the President with the consent of the Senate.

2. Laborers.

3. Those positions which the President desires to "exempt" from the Act because of their special duties or because applicants cannot be properly tested by examination. Formerly these exempted places were dangerously numerous, but President Roosevelt on the recommendation of the Civil Service Commission reduced them to a safer limit by a rule adopted April 15, 1903. President Taft added many other positions to the classified list.

The law provides a simple and effective method of enforcing the merit system; a civil service commission of three members is appointed by the President with the consent of the Senate. It watches over the entire field of civil service appointments, dismissals and promotions. With the President's approval the commission makes rules classifying the various positions according to salaries and duties, and providing an examination for each class. Other subjects governed by the rules are, the conduct of examinations, the keeping of service records, showing the results secured by each employé, and the prevention of party taxes, or "assessments" on the salaries of office-holders. These party assessments were formerly a serious drain upon the resources of all civil service employés. The congressional campaign committee once levied a tax of 2% on the salaries of all office-holders in the Federal service, and sent requests for these amounts to every employé including janitors and scrub-women employed in Federal office buildings. The practice still persists in city and State positions.

**How Appointments are Made.**—The various positions in each department having been properly classified, as already explained, an annual examination for each class of positions where vacancies exist is held under the direction of the civil service commission. The candidates who pass the examination with a certain required average are placed upon a list of eligibles in the order of their averages. When a vacancy occurs, for example, in the office of a clerk at twelve hundred dollars per year, the appointing officer notifies the commission of the vacancy and asks for eligible applicants. The commission certifies to the appointing officer the three names standing highest upon the list of eligibles for that class of position. From these the selection is made and a six-months period of probation is allowed; at the end of that time the appointment is either made permanent or another set of three names is certified. To direct its examinations the commission employs a chief examiner and appoints examining boards in all the large centers of population. The law prohibits the appointment to the classified service of persons habitually using intoxicating beverages to excess, the appointment of more than two members of the same family, the recommendations of applicants for office by Senators or Representatives, and any solicitation, receipt of gifts or moneys for political purposes by Government employés to or from each other or to or from Senators or Representatives. Preparation for the examina-



Promotion.—The highest positions political, are not filled by promotion. this practice to the extreme of making divisions, partisan “jobs” for outsider service. For this reason the only personnel consists of very subordinate rank of chief clerk downward. How in such a way as to secure the advance. There must be some fixed plan, yet such Length of service is not satisfactory; habit of mind which is the curse of all more feasible in public than in private tions where originality, discretion and judgment most efficient must be advanced regular service. Our great commercial corporations by men who have been promoted over more experienced fellows. The other higher on the list when measured by length have been equally punctual in their performance but they are passed over in the choice of lack that unrecorded and unrecordable initiative and which distinguishes the directing head. But to make such a decision seniority, in business, implies the exercise those making the choice. Precisely the the government service. The appoint judgment freely in making promotions cannot be bound by length of service no tests.

purely clerical positions, however, such examinations are thoroughly practical, and they even may be used in promotions to posts requiring technical knowledge, since such knowledge can be tested by examination.

In making promotions to a different grade as well as a different salary, inequalities in payment for the same service often arise. Because of this difficulty the Commission has provided in Rule XI simply that "Competitive tests or examinations shall, as far as practical and useful, be established to test fitness for promotion in the classified service," but has left the character of the test to the promoting officer. The most satisfactory system of examinations thus far obtained has been established in the Railway Mail Service, which includes the employés engaged in the actual transportation of mails upon trains and trolley cars and in the sorting and preparation of the same while en route. This work requires unusual mental quickness, physical vigor, energy and endurance. The force numbering about 9,000 has a record of only one mistake in every 10,000 pieces of mail handled. Periodical examinations are held which test the ability and fitness for promotion of each employé. These consist for the most part of tests on the names and locations of postal stations within the district in which each clerk is employed. This branch of the post office department is now considered the most efficient in the national service.

**The Service Record.**—Of all the plans for measuring fitness for promotion, the most promising is the service record, sometimes combined with the periodical examination. The record includes everything that can be systematically filed on the results of the employé's work,—his punctuality and promptness, his health, his absences from duty and their causes, his ability to get along with other employés, and most important, his ability and rapidity in the dispatch of his duties. This latter quality which is after all the real test of a man's usefulness and fitness for advancement, has never been recorded in many of the departments;—it is often most difficult to fix in definite terms, yet its importance is such that the Commission on Economy and Efficiency has laid weight upon the necessity of dividing all work, even routine matters, into definite tasks and keeping some record of them which would be comparable to the measurement and accounting of tasks in a factory. The service record is still in its infancy and is little more than an effort in the right direction but if this new feature can be incorporated in it with reasonable accuracy the problem of a promotion "system" will be solved.

**Removals.**—Among the Civil Service rules contemplated by the Act of 1883 we find "that no person in the public service is for that reason under any obligation to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so." To strengthen and extend this prohibition, Section 13 of the law provides that "No

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Because the authority to remove is  
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long as such removal will promote the efficiency of the service. The real causes of departmental inefficiency are the absence of practical service records as we have already noticed, and the appointment of all important officials above the grade of chief clerk upon a purely partisan basis.

If our civil service in America is to enlist the activities of the ambitious and well-trained men of the nation, we must not only pay much greater salaries than at present but we must also offer a career independent of partisan influence in the higher positions. It is hardly likely that valuable men will care to enter the public service while such uncertainty of tenure exists. This applies not to the clerks, stenographers, technical employé and chief clerks under the civil service rules but to those heads of offices, divisions and bureaus who are not protected. An important step in this direction was made when the post office adopted the policy of retaining fourth-class postmasters until a definite cause for removal was shown. Previously they had been asked to resign at the end of a four-year term or with the change of administration, but the new policy had the effect of giving them, as the law contemplated, an indefinite term, that is, during efficiency and good behavior. A similar method should be followed in other important positions to the lasting benefit of the public service.

**Practical Results of the Law.**—The Civil Service Act has brought about such a strong improvement in the public service that no President would consider a return to old conditions. Some of the departments have large numbers of employés chosen for efficiency and retained in office regardless of their political opinions, forming an admirable staff of subordinates who deserve high praise, and compare in intelligence, ability, and faithfulness to officials of similar rank in any country. The system has been criticized on the following points:—The Act gives the President the entire control of the Commission, allows him to approve or reject its rules and to exempt any position and offices that he sees fit from the operation of the rules. But we must remember that the control of any system that could be devised must be placed in the Chief Executive. There is no automatic method of appointment which could infallibly select the right man without the exercise of human discretion. There is only one person whose judgment must ultimately decide and that is the responsible executive official. A similar objection has been raised, that the merit plan is too mechanical because it lays too much weight on examinations. The best friends of the system, including members of the Commission, are quick to declare that the results of the examination should always be modified by the good judgment of the appointing officer. They willingly admit that a purely mechanical plan is by no means the ideal and that a man's practical ability to fill an office cannot be accurately shown by a written examination. In business circles, capacity is judged from the employé's past record, but this is extremely difficult in

in the law itself but in the concert and outside of Congress. The law carries out the national law in the has been a serious and at times a For years it has been the custom o ciple to make a combined attack u sion when the appropriation bills House of Representatives. This att mittee of the Whole House," becau their votes are not recorded in that C Committee regularly voted to defe Commission. Upon the amendmen House, however, the item for the Com the bill because the names of those recorded in the House and frequently p This action, while it does not immedia yet shows the attitude of many mem civil service system and explains the execution of the law. The practice o funds low has prevented it from tra inspect and supervise the local boards tions. *Many of these have not been vi isation.* Under such conditions the be is impossible. Questions have been as bearing whatever on the duties of the examination for clerks in a mint, some asked the height above sea-level of the States! The Commission has had vising its



merit plan is not so much that the former placed certain men in office but that it failed to keep them there. In the brief description of party organization above we have seen that the political worker is in many cases an intelligent, capable man who might do well by keeping out of politics altogether. It cannot be said that the spoils plan put the best men in office, nor on the average as good men as are now chosen, but it may be maintained that a large number of most excellent officials were appointed under the old plan; the chief difficulty was that they were never allowed to make a record for themselves, but were indiscriminately turned out with the change of the political tide. Greater continuity and experience are the foundations of the present system. There is still needed the opportunity to secure advancement to the higher posts in the service and the measurement of this advancement by the service record of the aspirant.

**The Civil Service in States and Cities.**—Thus far nine States, Massachusetts, New York, Wisconsin, California, Colorado, Connecticut, Illinois, Ohio and New Jersey have introduced the merit system permanently in their civil service. Massachusetts in 1884 took the first step, establishing a commission on the same general plan as that of the National Government. It was subsequently provided that not only appointive State offices but also positions in the municipalities and towns of 12,000 inhabitants and over should be classified under the rules, in case such municipalities formally accepted the law. This acceptance was made entirely optional. The Act does not apply to appointments requiring the approval of the Governor's council or of the municipal council, nor to any elected officers. These latter provisions have had the practical effect of restricting the application of the law to clerks, stenographers, engineers, school janitors, truant officers and the municipal police and fire departments, since all the other and more important offices required council approval for appointment. This, however, is not to be taken as condemning the system; the benefits of the competitive examination plan are undoubtedly greatest in the clerical and inferior positions, and these positions are by far the most numerous in the public employ. There is no valid reason why appointments requiring the approval of the Governor's council or of the municipal council, should be exempted from the rules; in fact we have already seen that the approval of executive appointments by a legislative body offers no benefits to the public service. The historical reasons for giving the council such a power of interference have long since disappeared, while the disadvantage arising from purely political influence is now clear to all. It will hardly be contended by anyone at the present time that legislative approval of executive appointments serves any real purpose except the division of offices among members of the legislature. The idea of exempting such positions from examination under civil service rules can only spring from the desire to secure

the appointment of particular men designated by the legislators. Under the Massachusetts law nearly all the more important cities of the State have formally accepted the new system and applied the rules. These rules are not issued by city authorities, but by the State Commission, a plan which has the greatest advantage of taking the administration of the law out of the atmosphere of local partisan interests, and secures a more uniform and efficient application of the entire plan. Boards of examiners are appointed for each city, but they are in all respects subject to the direction and control of the general commission. A number of other States have adopted the Massachusetts plan and applied the merit principle to their cities.

The New York law of 1889 provided for a State Commission; the law has, however, several characteristic features. In each city a commission is appointed by the Mayor to enforce the law by issuing rules governing the city service. These local commissions are removable either by the Mayor or by unanimous vote of the State commission, for incompetence, inefficiency, neglect of duty or similar causes. In such case the successors are appointed by the State commission. The latter is also given power to rescind any rule, regulation or classification made by the city commissions, provided that such action is taken on the ground that the municipal rules and regulations are not suitable for the execution of the State law. Disbursing officers are prohibited from paying salaries to persons illegally appointed, while employes and officials whose rights are injured by violations of the law are given the privilege of a writ of mandamus. Taxpayers may also bring action to restrain the payment of compensation to any persons appointed in violation of the law. Veterans of the army and navy and of the old volunteer fire departments may not be removed except for incompetence or misconduct shown by a hearing after due notice, upon stated charges and with the right of a judicial review by a writ of *certiorari*. So rapidly has the new system taken root in the cities that several commonwealths which have no civil service rules in their State government have passed laws allowing their municipalities to adopt the merit principle. A great host of cities have already done so.<sup>1</sup>

**The Illinois System.**—The city of Chicago and, following its example, the State, have gone farthest in developing efficiency in the local service. Chicago created a special efficiency division of the local commission. This division made a study of the powers and duties of all the offices in municipal departments, the number of employes and the assignment of work, the adjustment of salary to work, the methods of supervision and the means of measuring

<sup>1</sup> An excellent summary of recent progress is given in the annual reports of the U. S. Civil Service Commission. See also the article by Albert S. Faught, in the *National Municipal Review*, April, 1914, "The Civil Service Laws of the United States."

and recording the quality and quantity of work done by each employé and each office. This survey immediately showed great inequalities among employés who were doing the same kind of work, also considerable waste and duplication of labor, together with lack of adequate supervision and responsibility. Each department head furnishes to the commission on blank forms provided by that body, a report on the attendance, conduct and quality of work of each of his supporters. The efficiency division makes an immediate investigation of employés with exceptionally high or unusually low scores. Two marked advantages of this plan have already resulted,—the department head is stimulated to more careful supervision of his force and to the removal of inequalities and favoritism in the treatment of employés; and the commission itself receives the benefit of a complete knowledge of all the departmental work done and is able to adapt its entrance requirements accordingly. Following the success of the Chicago system, the State government in 1911 enacted a law containing among others the following unusual provisions:

The entire service is placed under the control of the commission. The exempted political positions are limited in number. Even laborers are selected by competition. The person standing highest on the list among the competitors is chosen for the position. He is given a probationary period and may be discharged if unsatisfactory but it is not necessary for the commission to certify the three highest names on the list as in other States. The Commission fixes by rule the grade of each position and the highest and lowest pay for each grade. As a result, a great number of inequalities in payment and work have been removed. The Illinois plan is notable in that it does not confine the Civil Service Commission to the mere work of conducting examinations and supervising entrance, promotion and removal rules but enlarges its scope to include what every commission should be authorized to do—study, supervise, and improve the efficiency of the public service. Several other State commissions including those of New York and Wisconsin have conceived their work in the same useful spirit. The movement promises an increase in efficiency which is only limited by the reluctance of the legislatures to co-operate.

**Special Problems of the Public Service.**—Of the unsolved problems in this field the first and greatest is the education of the people to regard the public employment as a life career. England, Germany, France, Austria and Russia have all created a permanent office-holding class to carry on the executive business of the nation. This is by no means a convincing proof that the United States should adopt the same policy. Russia is attempting the gigantic task of creating a nation, telling it what it shall believe, what it shall do, even what it shall want; she is also making efforts to satisfy those wants and at the same time to carry on an extensive policy of foreign assimilation; to do this she must needs have a highly



trained, semi-military public service which can be disposed according to best advantage at a moment's notice—an army of civilians. England has an immense colonial system which requires her constant attention and efforts; she cannot afford to dispense with a professional service and is indeed obliged to attract her best talent into the colonial positions by the offer of high salaries and a secure tenure of office. Germany and France are coping with most difficult internal problems in the improvement of the condition of their laboring classes. All these nations have reached a stage where a great and complex public service organization is essential; such an organization can only be created by offering an honorable and attractive life career to those who enter the State employ. Although we in the United States have not yet reached the European status of internal and foreign problems, we are rapidly approaching it. In the world of international politics, we are beginning to take our bearings, and our domestic questions are already stirring us deeply. The management of dependent territory, the development of trade abroad and the protection of the investor, the consumer, and the laboring class are the three great educating, broadening problems which are rapidly bringing us out of the rank of young, "provincial" nations to the class of influential world peoples, with a clearer consciousness of our destiny. Our public service must reflect this growth. We do not yet enlist our best talent in the government personnel. There are still great business enterprises to be originated for the development of our natural resources, combinations of productive force to be made, and entirely new plans of commerce, manufacture and agriculture yet to be drawn. These still demand and receive the very best business talent of the people. It has been only after these fundamental economic plans were fairly matured that the governmental questions growing out of them could begin to attract the attention of the type of men now in the service of corporations. If we scan the list of those who have been conspicuously successful in the public service and who have shown pre-eminent ability in their respective fields, we find that they sooner or later enter the service of great industrial and commercial enterprises. Naturally the able men cannot afford to remain in the public service. The position of a bureau chief or a head of a division, even in the National Government, does not as yet compare with that of manager, superintendent, or general passenger or freight agent of a railway, either in the attractiveness of the work to be done or in the salaries offered.<sup>1</sup>

Once the government enters upon an aggressive foreign policy or attacks in earnest our domestic problems, there is no reason to

<sup>1</sup> There are a number of exceptions, notably in the Forestry Service, the Reclamation Bureau, Bureau of Corporations, and other parts of the National Government, in which the work is so important that a high class man is required. In these positions the salaries, \$5,000-\$7,000, have not yet been raised to a point equal to the importance of the work performed.

fear a dearth of the best material to fill the important posts. In the lower routine of government work, however, the case has been different; the clerks, stenographers, and copyists and less important officials in the public employ become fixed in the routine of an office and remain indefinitely. While in the higher offices the tendency is to drift out of the public service, in the lower, the aim is to stay in because ambition is soon smothered. Our political conditions have made the lower service not a career but a trap. Closely related to this is the question, what training should be required of a government official? In all those countries where the government has become a distinct profession, careful training is prescribed for the higher service, sometimes reaching a period of from six to eight years. The need of such a plan in the United States must be judged largely according to the answer given to the previous problem. At present no such requirement exists but when the higher civil service here begins to offer a life career the government should prescribe a period of thorough preparation as is done in all other professions.

**The Civil Pension.**—A similar question is presented in the proposal of a pension for all civil service employes who have been injured while in the performance of duty, and also for those who have served faithfully for a long series of years and have outlived their usefulness. For the first class there is every reason to provide a reasonable annuity under proper safeguards. The service of the National Government, in particular, includes a wonderful diversity of occupations, from the sweeping of floors to the construction of battleships. Many of these employments are accompanied by great danger, as in the railway mail service; if an employe in this bureau or in a government navy yard is seriously injured in the course of his duties, he is as deserving of relief at the hands of the government as is the soldier wounded by an accidental explosion in time of peace. Yet the latter is awarded a pension for life. It is not a sufficient answer to argue that civil employes are aware of the danger of their occupations and voluntarily take upon themselves the attendant risk—so does the soldier,—nor is it reasonable to declare that they are at liberty to insure themselves in accident companies. The proposal of government pensions for employes injured in the course of service rests upon a broad principle which is being recognized in all forms of business, both public and private, viz., that those who render faithful and efficient service should in some way receive special protection from the hardships and loss of earning power incurred in the performance of their duties. Foreign governments have long followed this principle in their pension systems. Pursuant to this idea the law of May 30, 1908, provides that laborers, artisans, etc., employed in certain departments of the government service shall be paid a compensation for disability incurred by accident in the service. The amount depends on the severity of the accident and the length of time which it lasts. No

person is paid more than the total amount of wages for one year. In case of death the payment is made to the family. This Act affects about seventy thousand employes. There are also disability payments made to the members of the Life Saving Service under the Federal law, but these measures do not apply to the clerical positions and the latter are entirely unprotected in case of accident in the performance of duty.

Regarding pension or retirement allowances for those who have outlived their usefulness in the public employment, the decision is more difficult. It depends largely upon the answer to the fundamental query—shall we make public employment a life career? In case of clerks with a permanent tenure of office there is no reason why such employes should be any less favorably situated than those performing similar work for the great business corporations. One by one the more important railway systems and industrial concerns are providing retirement and disability pensions for their employes. Some of these plans are by no means liberal in their terms,<sup>1</sup> but practically all of them involve substantial contributions to the pension fund by the employer. These systems show that larger numbers of the people are obliged to devote themselves to a limited, salaried occupation in which there is no means of support after the earning capacity has been exhausted. Such a view should be taken by the nation as a whole no less than by its business corporations. In the National Government there are now carried on the rolls a large and increasing number of clerks who are unfitted, by age, for the active performance of their duties. Competent observers who are thoroughly familiar with the departments at Washington estimate that in the various bureaus located at the national capitol, between 10 and 16% of the employes are superannuated. Strange as this seems, it is to be accounted for by the easy-going, good-natured way in which Americans have heretofore regarded the work of their government. We are in effect already supporting a pension roll of an expensive character.<sup>2</sup> For the higher positions of a political tenure, there is of course no necessity for a retirement pension at present, since no one is kept in office long enough to earn one.

Opposition to the civil pension plan comes from two principal sources, first, the view that a place in the public service is more or less of a sinecure, to be passed around among the people. This view requires no comment. The second cause of opposition is the fear that the civil pension may follow the course of the military pension and become a public abuse; it is not denied that the principle of both retirement and accident pension is a sound one, but it

<sup>1</sup> Most of them provide an allowance of \$20 to \$30 monthly.

<sup>2</sup> A carefully prepared pension plan has been submitted in the annual reports of the United States Civil Service Commission. An excellent presentation of the need for such a system was published in 1912—*The Civil Service by the Committee of One Hundred*—a body formed for that purpose—in Washington, D. C.

is claimed that a constant pressure would be brought to bear upon the government to extend the system until a serious burden upon the national treasury would result. The force of this objection is greatly lessened by the fact that we do carry the old and enfeebled clerks on the pay roll now, and by the inherent justice of the pension plan. The sentiment in its favor has steadily increased and its final adoption awaits only an easier state of the national treasury. It is by these steps, just described,—entrance on merit, promotion on service record, tenure during efficiency and reasonable care in accident or superannuation,—that the public service is becoming a life career for the able and ambitious man. There are occasional delays, there are even severe setbacks, but the progress has been steady and widespread and already it can be said that we are creating a government profession of moderate or fair rewards, increasing permanence and high ideals.

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#### QUESTIONS

1. Explain the chief purposes aimed at in the reorganization of the civil service which is now progressing in national and State governments.
2. Why did we have no active movement for civil service before 1880?
3. Explain the central thought in the "Merit" principle.
4. How far has this principle progressed in the national, State and local service at the present time?
5. Why is it weakest in the State governments?
6. Explain the practical obstacles to the progress of the "Merit" system.
7. Prepare a report showing: The rise of the demand for a modern system of civil service, and,
8. Number of positions in the Federal service, the number subject to the Civil Service Act, the types of position to which the Act does not apply.
9. Sketch the main provisions of the Act of 1883.
10. You are an applicant for a post in the classified service,—show the procedure which you would follow and the chief rules governing your application.
11. How does the exemption of the highest officials from civil service rules affect the lower grades of the service?
12. Resolved, that promotion in the government service should depend on length of service. Defend either side.
13. What basis of promotion is usually followed in business houses?
14. Explain the examination as a basis of promotion as used in the railway mail service.
15. What is the difficulty in making a service record the basis of advancement?

16. Summarize the main provisions of the law on removals from the Federal civil service.

17. A clerk who is discharged from a Federal bureau appeals to the courts on the ground that he was not given a hearing as required by the rules. What would the court decide and on what authority?

18. A democratic clerk in a republican administration is discharged without being notified of the reasons. Has he any redress?

19. Explain the more important criticisms of the civil service and give your impressions of their weight.

20. Why does not the civil service commission visit the various examining boards which conduct the tests for entrance?

21. Are appointing officials generally opposed to or favorable to the "Merit" principle?

22. Prepare a report on the Massachusetts Civil Service Act, showing its most important provisions and the regulations adopted under it.

23. How has it been applied to the cities?

24. Explain the unusual features of the Illinois law.

25. What are the advantages of the Chicago system?

26. Have you a merit system in your State? If so outline it. If not make a draft of one which would be desirable and practical.

27. Are our business and political conditions becoming more or less like those of Europe in such a way as to require a professional civil service? How?

28. Why is it hard to retain exceptionally able men in the Federal service?

29. Explain the more important proposals for civil pensions and give your impressions of the value of these proposed plans.

30. Why are superannuated employes carried on the pay rolls at Washington to-day?

31. Prepare a brief essay on the civil service as a life career, setting forth also the views of two civil service employes of your community as to the advisability of entering the service of the City, State or Nation.

## CHAPTER XXIX

### DIRECT LEGISLATION—THE SHORT BALLOT

THE remarkable ease with which a compactly organized group in the State legislature or the city council can defeat a popular measure, or force the passage of an unpopular one has led to a vigorous search for some means of making legislation more truly represent the expressed will of the voters. This search has directed general attention to the plan known as Direct Legislation;— which includes the Referendum and the Initiative. These institutions, which were first viewed with scepticism in this country because they were of foreign origin, have slowly grown in popular favor until in one form or another they have secured a firm foothold and, aided by the general popular discussion of government questions, they are now being adopted in most of the advanced States, particularly in the central and western parts of the country.

**Origin of the Referendum.**—The Referendum grew out of the old Teutonic custom of referring questions to a majority vote of the tribesmen present at a political council or "moot." This vote which the warriors originally cast by the simple grounding or rattling of their spears, represented the public opinion of the tribe. In more peaceful times every freeman or citizen who was admitted to the council had his vote, and on all matters referred to the general council of citizens each was given an equal vote.<sup>1</sup> In certain of the smaller Swiss cantons or States the entire population of male citizens acts directly on all legislation at a periodical gathering like a town-meeting which is the direct descendant of the old "Moot." This direct law making is of course not possible in the larger States because the people could not be convened in one gathering. Accordingly they have chosen representative legislatures but have reserved the right to require that any law passed by the representatives must, on demand, be referred to the masses of the citizenship for approval. As legislation grew in volume and the cantons increased in population it became necessary to provide that when the citizenship wanted to vote on any law, a petition should be circulated among the voters and when a certain proportion of them had signed it, this petition was presented to the legislature, and the law in question was then subjected to the popular vote. When the cantons united to form the present Swiss National Government, this Referendum was also taken over into the Federal Constitution: it was provided that all constitutional

<sup>1</sup> A good short description of the early moot and some of its later influences may be found in John Fiske, *American Political Ideas*.

amendments without exception must be submitted to the popular vote, and that any Federal law should be "referred" if a petition was successfully circulated, containing a given number of names.

**The American Referendum.**—In the United States the Referendum has been frequently used from the earliest times. Most of the State constitutions may be amended only after a final vote of the citizens in approval. The city charters are often required to be approved by the city electorate. The temperance movement in its local option form is an application of the referendum to the liquor question, the voters in each township deciding at an election whether liquor shall be sold or not. The debt of cities and counties may not be increased beyond a certain proportion of the value of taxable property located in their borders, except with the consent of the voters, and in general all important changes affecting the fundamental constitutional law of a State, county, a city or even a school district may only be undertaken after the voters have expressed their wishes at the polls. In this form the Referendum has been a conservative feature of our government, tending to restrain the momentary whims and flights of the legislatures, both State and local. The present popular movement involves its extension to all legislative acts so that the people may defeat any State measure whatever, which they disapprove.

A typical Referendum plan is that used in Oregon, where a vote is held on any bill passed by the legislature when 5% of the voters sign the petition, or when the legislature itself so orders. Petitions are filed with the Secretary of State within 90 days from the adjournment of the session. Copies of the full text of the measure are printed by the Secretary of State and distributed among the voters together with any arguments for or against the measure which any person or organization may deposit with the Secretary, accompanied by a sufficient sum of money to cover printing expenses. Heavy punishment is provided for any person who signs a petition with any name other than his own, or who signs his own name more than once on the same petition. A Referendum may be taken upon part of an act as well as upon the whole. The voters of any city or town may also have a Referendum on local ordinances upon filing a petition signed by 10% of their number.

State laws which the legislature declares to be emergency measures necessary for the peace, health or safety of the State may go into operation immediately without waiting for the Referendum to be held. If a measure is not so declared an emergency act, it becomes operative 90 days after the legislature has adjourned, unless a Referendum petition has been successfully circulated meanwhile. If such a petition, so signed, is filed within the required 90 days, the Act does not become operative until approved at the polls. Elections are held every two years.

**The Initiative.**—The Initiative is also a Swiss idea, but is of comparatively recent origin, the first general application having

been recorded in the Swiss canton of Vaud in 1845, in which the cantonal constitution was amended to provide for a rudimentary form of the new idea. In the smaller cantons where government was conducted directly by a gathering of all the citizens, as we have seen, it was necessary to have some form of procedure for the popular gatherings. If a new bill was to be introduced for action by the meeting, the rules required that it should be first signed by a number of the citizens before it could be considered by the assembly. This is in fact the original form of initiative. In those cantons which were so large that the voters could not meet at one place, a representative legislature like our own was established; when the citizens wanted a particular question considered, a petition was circulated and after it had secured the signature of a given number of voters, it was presented to the legislature. That body was then required under the constitution to act upon the bill in question.

In Oregon and other American States, the Initiative varies from the Swiss form. Here the petition is circulated among the people, and after it has been signed by 8% of the voters or more, it is filed with the Secretary of State, who places it upon the ballot at the next election. If a majority of the voters approve, it becomes a law without further formality—so that a bill which is proposed by the Initiative may be enacted without the aid of the legislature. If two or more conflicting measures are approved by the people, that one becomes law which receives the highest affirmative vote. The Oregon constitution also grants to voters in cities and towns the right to initiate local measures or ordinances requiring the signature of the petition by 15% of the local voters. Some States require a higher and some a lower minimum percentage of the voters to sign the petitions; in some States the Initiative does not have the immediate effect of bringing a bill before the people for their approval but brings it first before the legislature; in other commonwealths again the method of bringing to the popular attention the arguments for and against a pending measure is strictly regulated by law, while in others it is not. But these are differences of detail which do not vitally affect the fundamental idea on which the system is founded, which is to give the majority of the voters a control not only of the membership of the legislature but also of the measures which that body passes.

Eleven States have also applied the Initiative to changes in their constitutions, enabling the voters to propose amendments independently of the legislature. Eighteen of the commonwealths have already adopted both Initiative and Referendum on their laws and several others are considering a like change. There are numerous variations from the Oregon system in detail but the main principles are usually the same. For example, Minnesota requires the signatures of 6% of the voters for the Referendum petition but the bill to be referred becomes law at once unless 15% sign the petition. In Iowa an Initiative bill is placed on the ballot



at the subsequent election but meanwhile it is submitted to the Supreme Court which must report within 20 days as to its constitutionality. If unconstitutional the bill is not placed on the ballot. The Washington law of 1913 provides that the Initiative bill shall have a title not exceeding 100 words, on the ballot, that there must be filed with the Secretary of the State a financial account of the organization proposing the bill, and the amount of contributions received and expended to secure its adoption, the legislature itself may propose to the voters a competitive bill, and a State board of censors shall edit the various pamphlets published officially for distribution to the voters, containing the arguments for and against the measures to be voted on. This "publicity pamphlet," as it is called, has now been adopted almost universally by the referendum States, as a means of informing the voter.<sup>1</sup>

**Objections.**—Among the chief objections raised against the system of direct legislation are the following:—

1. The masses of the people have no opinion on most of the subjects to be submitted by the Referendum. They care little or nothing about the merits or defects of a particular law, they therefore participate only irregularly in referendum votes,—such a referendum cannot represent the will of the people because the final decision is made by a majority of only a small proportion of the people.

2. The difference between a constitution and ordinary laws is largely obliterated by the referendum. Under our older system only the constitution of a State as a rule is submitted to popular vote, and the people therefore feel that it represents something more sacred and permanent than the ordinary State law. But once we adopt the referendum on any and all measures, this distinction between constitution and law vanishes and the spirit of and respect for our institutions would be radically changed.

3. Direct legislation would tend to weaken the sense of responsibility of the legislature,—it makes that body a mere drafting committee, which does not vote for or against a bill but votes to give the people a vote on the bill. This feeling of irresponsibility must inevitably affect the legislature's attitude towards all public questions, regardless of whether they are to be submitted to referendum vote or not. The referendum therefore tends to lessen that very feeling of responsibility which so many of our other reforms have been aimed to increase. Good government is not to be secured by scattering responsibility but by concentrating it.

4. It also lessens the sense of responsibility of a voter who is called upon, in season and out, to register his will on a great variety of subjects with most of which he is not familiar. By overloading and overwhelming him the referendum must eventually discourage even his performance of his ordinary political duties. Our people

<sup>1</sup> The leading publication on Direct Legislation is the magazine *Equity*, published in Philadelphia. An excellent history of the movement is given in the issue of January, 1913.

are not in the habit of weighing the merits of particular statutes or appropriations; their experience has been confined to passing judgment upon men and upon general lines of policy. We already have too many elections, and the most hopeful means of improving government are those which concentrate the voter's attention on a few issues and a few candidates.

5. If on the other hand the referendum is used only in the case of laws that have aroused much party feeling, the necessary signatures to a demand for a popular vote can easily be collected at any time by the minority party, and the referendum can be used as a means of securing harassing delays.

6. The system is both cumbersome and expensive. It relies upon a complicated election machinery which must frequently be brought into action, involving a heavy outlay for printing and for the holding of elections, the preparation of bills, the rent of voting rooms, the pay of inspectors, judges and clerks.

7. The referendum is not required in this country because here the executive possesses the veto to check undesirable laws and the courts have full authority to declare unconstitutional those measures which violate fundamental legal principles. Switzerland having neither of these safeguards may well use the referendum, but America has no real need of this additional check.

8. The Initiative has been especially objected to because it provides no careful drafting of the proposals or new bills which are to be submitted to the voters. These bills may be crudely drawn, they may be full of serious defects, yet they must be sent to the people in precisely the form in which they are filed. The Initiative is therefore not a method of offering the people an opportunity to express their views, but on the contrary it is a cunning and effective device for imposing upon the people the views expressed in the proposal and to delude the unthinking into the belief that they are acting for themselves. If another individual has another suggestion, however slight the difference in subject-matter, it must be embodied in a separate proposal and voted upon separately. This is because the representative principle, which permits of discussion and modification of views, is wanting.

9. Direct legislation opens a field for the specious demagogue. This objection has been expounded frequently and is already familiar.

10. It especially opens the way for radical and unwarranted interference by the government with private business and must inevitably increase this interference many fold. The danger to business interests from this source must soon become so serious as to form a grave menace to our industry and prosperity.

An extensive array of evidence is also presented, based on the recent experience of those States which have adopted the system. It is pointed out that the direct legislation plan was accepted by the voters of Oregon in 1902 with but little debate, and with about 76%

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**Answers to Objections.**—To the  
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3. There has been no hasty, ill-advised legislation enacted.

4. The interest in government has increased to a remarkable extent. This is especially noticeable in the public schools and other organizations. "Brains, ideas and arguments rather than money and log-rolling govern the standard of legislation." The greatest of all changes has been that the exclusive control of government and of legislation by party leaders or bosses, has been abolished and the independence of the voter has become an established fact.

The arguments pro and con above presented have been collected as impartially as possible from both friends and enemies of the new plan; weighing these carefully the bulk of evidence seems to favor the results thus far secured by direct legislation. Undoubtedly the system has at times been extended on too large a scale, by applying it to an excessive number of measures in recent elections, but impartial observers must agree that the practical effects have been in some points good. No serious attacks have been made on private property or liberty, no revolutionary or subversive changes in the government have been made, nor have the people lost their sense of responsibility, as was predicted. Party ties have become looser, but this has in no way injured the general welfare. The people have displayed great independence of thought, and above all, the type of men who have come to the front under the direct legislation system is distinctly superior to that of the older régime. There still remains doubt in the minds of some as to the effect which the new wave of radical sentiment, now sweeping over the entire country, may have upon the States which have adopted direct legislation. Some observers fear that the new radicalism will find in direct legislation a ready means of overturning the liberty and the rights of the individual and that the momentary whim of a majority may dictate dangerous changes in the laws of States, sweeping aside constitutional protections and guarantees of the individual. To these there can be but one answer. The bulwark of conservatism is in the people themselves. We cannot make them more conservative by rendering the government less responsive to their will. Republican institutions are not a toy to be taken from the people in times of emergency. Such institutions should be as responsive to the popular will as they can be made,—and the popular will must be educated.

**The Recall.**—In order to complete the popular control over State government the recall has been adopted in many of the States; it allows the voters to retire officials for any reason whatever which seems satisfactory to the electorate. The usual method is to file a petition signed by a required percentage of the voters; this has the effect of placing on the ballot at the subsequent election the question whether the official concerned shall be retired or not. In Kansas the petition may only be signed by those who voted for the officer but this is not common in other States. Eight of the commonwealths have already adopted the recall, principally those

of the Middle West, and four others have provided for its submission to the people. In Minnesota the petition must be signed by 20% of the voters; 200 words are allowed on the ballot to state the reasons why the official should be retired. If the vote favors recall, a vacancy is created which is filled in the same manner as any other vacancy in the office concerned. In this State and in Kansas the principle has been extended to include appointive as well as elective officials, on the ground that many of the former exercise powers which are as fully political in their nature as those of the elected posts. It is claimed that this will overcome one of the strongest objections to the short ballot,—many conservative people fear to adopt the short ballot principle because of the danger that it would so greatly concentrate power in the appointing officer as to take all control of the State offices out of the hands of the people. The recall of both appointive and elective officials, however, if properly safeguarded, would overcome this objection. The States already having a recall provision in their constitutions are

Arizona,	Minnesota,
California,	Nevada,
Colorado,	North Dakota,
Idaho,	Oregon,
Kansas,	Washington,
Michigan,	Wisconsin.

**Recall of Judges and Judicial Decisions.**—The official recall has been applied in several States even to the judges. The usual method of registering a petition with a certain number of signatures representing a fixed proportion of the total registered vote, is observed. California and Oregon provide for such a recall in their constitutions but no serious use has thus far been made of the provision. The constitution of New Mexico, when it applied for admission to the union, likewise contained a judicial recall, but upon the insistence of President Taft this was dropped and the territory was admitted with only the ordinary recall provisions, exclusive of judges. There are strong reasons urged against the judicial recall. It is forcibly argued that the judge should be removed from politics and partisan intrigues as far as is practicable. In order to accomplish this, his decisions, however much they may be tinged by public opinion, should not be influenced by a desire to secure re-election. This result can only be produced by giving him some independence of tenure, with which a recall must inevitably interfere. In order to avoid destroying judicial independence, while yet obtaining the desired sympathetic quality of judicial decisions, Colonel Roosevelt, in his Presidential campaign of 1912, proposed that a court decision declaring an Act unconstitutional should be subject to a popular vote at the following election and that if the people voted to sustain the Act, the law should stand and the constitutional provision should itself remain unchanged except with respect to this one law. On behalf of this proposal, it is

urged that it would obviate amending the State constitutions in many cases where there is no desire for their amendment, except to enable the legislature to pass a single Act such as a workmen's compensation law and where the difficulty of amendment is so nearly insuperable as to hold back much needed legislation for a long period of years. Here it is claimed that the effect of the popular recall of decisions would be in no wise to diminish the respect for the courts nor for the constitution, but to establish simply the fact that in a supposed conflict between a constitution and a law it was the expressed wish of the people, after a suitable interval for reflection, that the law should stand.

The objections to the popular reversal of court decisions run along two entirely distinct lines, the first that it is "an attack on the judiciary"; the second that it involves too much voting and places too much at stake on the outcome of a single election. The first objection is utterly untenable and merits consideration only because it is uttered with such raven-like solemnity by those who advance it. After all, no proposal for the improvement of any department of government need be construed as an attack on that department. Men of such widely differing views and temperaments as former Presidents Roosevelt and Taft agree on the one point that we are not getting from our courts the results that we should, and that something must be done to improve both the quality and quantity of their output. In so far as this opinion can be construed as an "attack" every department of the government is subject to such revision. It is the only means by which our fallible government system can be kept in running order. The second objection, however, is a most forceful one. If the conclusions which we have already reached in the Chapter on Public Opinion are sound, then that opinion is not a universal corrective prepared at every moment to give an accurate verdict upon any and every problem that may be put to it. There is a constant and keen competition between issues, to secure and hold popular attention. In the amazing number and profundity of these issues we must not demand that the electorate perform such a feat as that required by the intelligent reversal of judicial decisions, unless abundant time and a thorough and continued concentration of public attention be made possible. For this our present conditions afford no opportunity.

**General Conclusions on Direct Legislation.**—In reviewing these various efforts to place political power more directly in the voter's hand we must conclude that the main principle, direct action, is sound when applied to the decision of a very few fundamental points of policy, or, in times of emergency when the machinery of representative government has escaped popular control. Such instances occur all too frequently in our cities and in the State legislatures. But we must also concede that direct legislation is an extraordinary remedy for extraordinary evils. It is not a common

means of conducting the government to be relied on in the everyday management of public affairs. The friends of the system have sought to ignore this fact while its enemies have concentrated their attention upon this one defect or rather feature of the system to the exclusion of its real and great advantages. Of the three most urgent needs in government structure to-day, directness, simplicity and concentration, direct legislation satisfies the first. The other two are more completely fulfilled by the Short Ballot.

#### THE SHORT BALLOT

**The Need for a New Ballot.**—In sharp contrast to the movement for direct legislation is the Short Ballot plan. Direct legislation is an attempt to go back to pure democracy by submitting questions to the people. The Short Ballot idea on the contrary, proposes that the people's action be concentrated on the election of a very few officials. These are to be given supreme administrative power; they are to appoint all other officers and to control the entire execution of the law. The practical basis of this new plan is unusually strong. We are to-day choosing so many officers at each election that no voter can tell anything about the real qualifications of nine-tenths of the men for whom he casts his ballot. He knows something of the men who head the ticket but the names of the others are unfamiliar. The candidates for aldermen, councilmen, coroners, surrogates, sheriffs, and a horde of others he has never seen nor heard of. He is forced to vote blindly under party direction. The great numbers of our people do not yet see this clearly, for they are still told that the most democratic form of government is one in which all the "servants of the people" are elected by them. This sounds plausible, and it would be true if these servants could be elected one at a time, and if we could actually find out their qualifications for office. But it is exactly by loading an immense number of officers upon the voter all at one time, that the task becomes superhuman, so that in despair he relies upon party action, that is, upon a machine leader.

**"Unpopular Government."**—This paradox, that by allowing the citizen to vote on everybody and everything we destroy his real control over elections is well stated by Prof. A. M. Kales in his *Unpopular Government in the United States*.<sup>1</sup> "The elector, by being required to vote too much, has been compelled to surrender to a large extent his right to vote at all, and to permit others to cast his ballot as they see fit. Formerly people were disfranchised when they were given no opportunity to vote. To-day they are disfranchised by being required to vote too much. Formerly the legal rulers of the disfranchised masses were selected for them by the few without equivocation. To-day our legal rulers are selected for us by the few through the subterfuge of the masses casting their

<sup>1</sup> University of Chicago Press, 1914.

ballots according to the directions of the few. In other forms of unpopular government the central figure has been the monarch, the autocrat, the oligarch, or the aristocrat. In ours it is the politician. We have avoided monarchy, autocracy, oligarchy, and aristocracy, only to find ourselves tightly in the grasp of a politocracy."

The politician has been quick to see the advantages to him of many elected offices and blind voting. He has multiplied these until it is the usual thing to find twenty to thirty offices on the ballot with from one to two hundred names of candidates. Occasionally the names run over four hundred, and in March, 1912, at the primary election in New York the ballot was 14 feet long. To offer any one of these ballots as a means of expressing popular opinion is a travesty on elections. They all show the need for some simple plan which will bring the theory and the practice of our institutions into harmony. The theory has been that the elector should vote because he has an opinion to express, while in practice the elector can have none because it is carefully smothered under an avalanche of candidates and offices.

**The Short Ballot Idea and its Application.**—The Short Ballot movement proposes to reduce radically the number of elected officers in all parts of the State and local governments. The principle as defined by its friends is—

First. That only those offices should be elective which are important enough to attract public attention.

Second. That all others be filled by appointment.

From this brief statement we see that the basic idea is simplicity and concentration. How has it worked in practice? It has been applied most completely in the commission form of city government, which, commencing in Galveston, Texas, has rapidly spread to many scores of cities all over the United States, ranging in population from 1,000 to 250,000. The origin of the plan is interesting, and shows the practical advantages of the short ballot principle. In 1900 the city of Galveston was completely destroyed by a tidal flood. It had previously been governed under the typical mayor and council form of charter, with a long series of elected officials. It was controlled by political gangsters, who battered on the appointments and city contracts, and on secret funds paid by the denizens of the underworld for police protection. This form of government, confronted by a great natural catastrophe, broke down completely. It was seen that no ordinary measures could succeed in the Herculean task of reconstructing the entire town, raising its level several feet above that of the Gulf to prevent future inundations, reconstructing the Health Department to cope with the epidemics that threatened, and reorganizing the financial system and the entire municipal administration. In the emergency the citizens grasped at the idea of a *small* commission, of five members, to be elected by the people and to possess all the power formerly controlled by the mayor and council. Each member of the commission took charge



of an administrative department, and with his fellow commissioners formed a small legislative body. In this way responsibility for every measure, whether it was a municipal ordinance or the appointment of an official, was immediately located in such a way that the department-heads could not escape the force of public opinion. The five men chosen to fill these positions were so successful in carrying out the task of reconstruction that they have been successively re-elected since that time. The unusual results secured by the Galveston plan soon attracted the attention of other cities and one by one a long series of municipalities have adopted the commission form. In one or two instances only, has there been a partial failure, and these are directly attributable to the character of the men first elected. The failure has been retrieved by the early substitution of other officials. The testimony of the merchants, officials, and citizens generally in the small-commission-governed cities, has been so strongly favorable that the movement has now gathered headway all over the country. At the beginning of 1914 there were 346 cities under this system, including such large towns as Denver, Portland, Ore., and Jersey City, 128 having adopted it in the year 1913 alone. The reason for its success is to be seen in the short ballot principle, which it embodies. The following analysis of the advantages of concentration in the ballot is given by Mr. R. S. Childs in a pamphlet<sup>1</sup> issued by the Short Ballot Organization of New York City:

"The commission plan of government is based on no false idea that the people want to elect every clerk. It gives the power to five men, who thereby become conspicuously responsible before all the people of the city. Each one of them is important enough to make it worth while for the citizens to inquire concerning his record and character. Each candidate for the office can attract a crowd to hear him speak, whereas an old-time councilman would have been utterly unable to get a hearing before the people. There are not so many commissioners but what every citizen can find out about all of them and vote intelligently on election day. There are not so many as to cause a citizen to depend upon tickets put together for him by political specialists. Each citizen can and does make up his own ticket, and the function of the professional ticket-making machines is thereby entirely disposed of.

"The commission plan succeeds therefore because it puts the power where the people can see it. The vital feature is not the method of organization, but the method of popular control. It is the ballot on election day which is unique. It is so short that every citizen knows what he is doing and is not relying on a party label or on the guidance of a politician. The "average man," "the man in the street," or the "plain people," whatever you choose to call them, are in complete control of the government.

"The most marked phenomenon of commission government has

<sup>1</sup> *The Short Ballot Cities.*

been the increased interest of the people in their city government. All eyes have been focussed on the city hall month after month without interruption. The acts of the commission are the topic of conversation for the street car and the business men's luncheon. Criticism is plentiful, and—better yet—knowledge of the facts is widespread. The people of the city oversee the government. The force of public opinion has been repeatedly illustrated in the commission governed cities. Few men, good or bad, would have the strength to resist popular demand when it is so intensively concentrated upon them. Each commissioner knows his responsibility for what is done, and knows that everybody else in town knows it too. Politicians of the average sort have been elected to office many times in commission governed cities, but their conspicuous responsibility has brought about a remarkable responsiveness to the opinion of the people.

"In our old-fashioned city governments we have committed two serious errors. First, we have scattered the powers of government among so many petty officials that it is quite impossible for the people to watch and control them all. Second, we have subdivided the power in such small fragments that no single part is really worth watching. A member of the city council for instance, under the old form of government, has so little power that it is really not worth while for the people of the town to become agitated over the question of who shall get the job.

"Those who promoted the idea of having a host of elective officials in the government have always taken it for granted that there was something democratic about this procedure. Democracy, however, does not consist in electing everybody, but in controlling everybody. The mayor's office boy, for instance, may be appointed by the mayor, or elected by popular vote. He is a public servant, but there is nothing democratic in electing him when he can just as well be appointed. The vital thing is that he shall be controlled by the people, and if he will be under better control through appointment than through election, it is more democratic to appoint him."

**The Idea Applied in the City Manager Plan.**—An important improvement has been made on the commission form in the "city manager plan" adopted in Dayton, Ohio. This also embodies the short ballot principle and combines with it the feature of permanent expert service. The commission elects no mayor but chooses a professional city manager who takes over the entire administration of the municipality, while the commissioners make ordinances and direct the work of the manager. The latter appoints and discharges all employés, as the superintendent of a business concern does, and he in turn may be displaced at any time by action of the commission. In the towns which have adopted this plan the commission has advertised for a manager and made its choice from a large number of well-qualified applicants. Many of the German

cities have for years followed this system in choosing their burgo-masters, and have entrusted these officials with precisely the same powers that the city manager enjoys. The combination of short ballot and professional administration in that country has long since solved many of the problems which our American municipalities are just commencing to face.

The author above quoted <sup>1</sup> has suggested the following arrangement of a ballot for each of four years, showing how readily the principle might be adopted,—(the State offices are given their New York titles).

First Year	Second Year	Third Year	Fourth Year
President and Vice President four years	Governor four years	Congressman two years	State Senator four years
Congressman two years	State Assem- blyman two years	Mayor four years	State Assem- blyman two years
City Council- man two years	County Super- visor four years	City Council- man two years	

**The Relation of Ballot to Party.**—The great advantage claimed for the short ballot by its friends is the restoration of the voters' real control over the party organization. No condition of American politics is conceivable in which we could dispense with parties. Some form of partisan system and organization is essential to every elective government. Since they are here to stay our real problem is to make them responsive and it is at this point that the short form of ballot offers its greatest service.

Professor Charles A. Beard has prepared a strong and suggestive statement showing the utter impossibility of democratic government under the present overloaded ballot, and the facility with which this situation could be remedied by the election of a few officers with extensive appointing power, that is, by the short ballot principle.<sup>2</sup> In this article and in his admirable work on the American Government, Professor Beard has shown some of the undemocratic features of the present ballot system, as used to prevent any expression of real popular opinion, especially in the primary nominations,—and it is in the primaries that our real control of government exists. Says Professor Beard:—"This system has not only paralyzed the ballot, but it has also perverted the political party from its true function, which is to reflect and formulate the policy of the various cohering groups within each

<sup>1</sup> R. S. Childs: "The Short Ballot" reprinted in part from the *Outlook*, July 17, 1909, and issued as a separate pamphlet by the Short Ballot Organization, New York. The greater part of this stimulating article is reprinted in the

political area. The political party in the United States, whatever may have been its historic rôle, has become a standing army of regulars, doing the work which the electorate is supposed to do and in too many cases reaping the advantages which should accrue to the public. The party is an office-filling machine, dealing in the salaries of offices and the privileges which they confer; and it is the democratic system of popular election, intended to establish the rule of the people and commonly supposed to realize this intention, which in fact prevents the people from ruling steadily and effectively.

"It would be possible to summon a host of witnesses, publicists, men of affairs, and practical politicians, in support of the doctrine that our elective system has been so overdone that it has ceased to be in fact an elective system and has become the prize of the expert. It would be possible to show a number of instances in which corrupt influences have actually sought the establishment of elective offices for the very purpose of taking the control of them out of the hands of the electorate. It would be possible to demonstrate that no other country in the world wastes so much of its best political energy in overcoming the friction of its governmental machinery. But it seems a work of supererogation to push the argument farther.

"The effort to attain a ballot short enough to assure real popular control, should begin in a reform of the central government of the State, by giving the governor power to appoint all of the executive officials, just as the President of the United States appoints the heads of departments. No good reason can be advanced why purely administrative officers like auditors, treasurers, and secretaries should be elected, for they have no large discretionary power and no share in shaping the policy of the administration. If the lieutenant governor is made the presiding officer of the upper house of the State legislature, some reason may be advanced for making the office elective; but it would be better to allow the Senate to elect its own president. It often happens that the governor is at loggerheads with the very men who are to assist him in 'the faithful execution of the laws,' because they belong to different political parties or, what is often worse, to contending factions within the same party. . . .

"In the sphere of municipal government there are already marked tendencies in the direction of simplification. All the recent charters of our large cities are increasing the appointing power of the mayor and giving him a larger place in the scheme of municipal administration. What New York has done in this regard is a matter of common knowledge. The recent report of the Boston Finance Commission recommends 'a simplified ballot with as few names thereon as possible; the abolition of party nominations; a city council of a single small body elected at large; the concentration of executive power and responsibility in the mayor; the adminis-

tration of departments by trained experts or persons with special qualifications for the office; full publicity secured through a permanent finance commission.”

**Advocates of the Simple Ballot Plan.**—The growing popularity of the short ballot principle rests on its sound basis in practical experience. It is this feature which has rallied to its support both political scientists and men active in public life, the practical politician and the conservative thinker. It is to-day favored by men of such widely varying political beliefs as Woodrow Wilson, Theodore Roosevelt, Ex-President Eliot, Senator Root, Governor Hunt of Arizona, Governor Hodges of Kansas and William S. U'Ren of Oregon.

It has been a universal experience of all political leaders who attempt to make any change or improvement in either our laws or our government system that the whole plan of dissipated responsibility is the most serious obstacle to improvement. The compact professional organization of each party fights any change to the last ditch. Its leaders often unable to give their real reasons for opposition to progress, denounce every attempt at improvement as an effort to overthrow the American government. Such is the nature of the opposition now directed against the Short Ballot proposal. It is not denied that the present ballot is beyond the possible control of the voter, nor that the short plan would give him a more direct action upon the many hundreds of officers which he now nominally elects, but really neglects, nor can it be doubted that the whole administrative system of the State or City would at once respond more vigorously and completely to the direction of its responsible executive chief. It is simply contended that the short ballot would concentrate power, and is therefore un-American. We may realize the real force and weight this objection contains from the fact which has already been considered in a previous chapter, that concentration has already taken place and that our political parties to-day are under the direct control of some one leader in each State. Far from being a discredit, the concentration of party leadership has been an undoubted advantage and has made it more efficient and responsible. A still greater benefit would be gained by a similar concentration in the machinery of State and local government, and such would clearly be the effect of the short ballot plan.<sup>1</sup>

<sup>1</sup> Says Theodore Roosevelt in his Autobiography, writing of his early struggles in New York politics:

“The most important of the reform measures our committee recommended was the bill taking away from the Aldermen their power of confirmation over the Mayor’s appointments. We found that it was possible to get citizens interested in the character and capacity of the head of the city, so that they would exercise some intelligent interest in his conduct and qualifications. But we found that as a matter of fact it was impossible to get them interested in the Aldermen and other subordinate officers. In actual practice the Aldermen were merely the creatures of the local ward bosses or of the big municipal bosses, and where they controlled the appointments the citizens at large had no chance

This is the principle which is gaining such rapid headway in the city government of all sections of the country. That it has not yet secured an equal foothold in the States is owing to the greater slowness of all changes in their organization. But already the first proposals for a rearrangement of commonwealth government have been worked out along the lines of greater concentration, as we have seen in the Chapter on State Constitutions. It would seem that there remains only the cultivation and development of public opinion on this point to bring about a general adoption of the principle. Its strength lies in the one fact that it simplifies and forces political action out into the open, and simplicity and open publicity are essential needs of our government to-day.

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whatever to make their will felt. Accordingly we fought for the principle, which I believe to be of universal application, that what is needed in our popular government is to give plenty of power to a few officials, and to make these few officials genuinely and readily responsible to the people for the exercise of that power. Taking away the confirming power of the Board of Aldermen did not give the citizens of New York good government. We knew that if they chose to elect the wrong kind of Mayor they would have bad government, no matter what the form of the law was. But we did secure to them the chance to get good government if they desired, and this was impossible as long as the old system remained. The change was fought in the way in which all similar changes always are fought. The corrupt and interested politicians were against it, and the battle-cries they used, which rallied to them most of the unthinking conservatives, were that we were changing the old constitutional system, that we were defacing the monuments of the wisdom of the founders of the government, that we were destroying that distinction between legislative and executive power which was the bulwark of our liberties, and that we were violent and unscrupulous radicals with no reverence for the past." And in his Columbus address in 1912 Mr. Roosevelt brought this same reasoning to bear upon ballot improvements:—"In the first place, I believe in the short ballot. You cannot get good service from the public servant if you cannot see him, and there is no more effective way of hiding him than by mixing him up with a multitude of others so that they are none of them important enough to catch the eye of the average workaday citizen. The crook in public life is not ordinarily the man whom the people themselves elect directly to a highly important and responsible position. The type of boss who has made the name of politician odious rarely himself runs for high elective office; and if he does and is elected, the people have only themselves to blame. The professional politician and the professional lobbyist thrive most rankly under a system which provides a multitude of elective officers, of such divided responsibility and of such obscurity that the public knows, and can know, but little as to their duties and the way they perform them. The people have nothing whatever to fear from giving any public servant power so long as they retain their own power to hold him accountable for his use of the power they have delegated to him. You will get best service where you elect only a few men, and where each man has his definite duties and responsibilities, and is obliged to work in the open, so that the people know who he is and what he is doing, and have the information that will enable them to hold him to account for his stewardship."

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### QUESTIONS

1. How would you explain the widespread movement for direct legislation in the United States?
2. Explain the origin of the referendum in Europe.
3. How is it applied in Switzerland to constitutional changes?
4. Explain its use in American cities.
5. Would you consider it a conservative or a radical measure? Why?
6. Outline the Oregon referendum plan.
7. If a special emergency law has been passed by the assembly, what can the legislature do to give it immediate operation?
8. If no special action is taken by the legislature, when does a law take effect?
9. What is the initiative and show how it arose in Switzerland?
10. Explain the Oregon initiative.
11. How has the initiative been applied to constitutional changes?
12. Give some idea of the extent of direct legislation in the governments of the various States.
13. How are the arguments for and against a "referred" bill presented to the voters?
14. Outline the objections to direct legislation with reference to the legislature's feeling of responsibility.
15. How are signatures to a petition ordinarily secured?
16. What objection is made to the form of bills presented by the initiative?
17. What criticisms are made as to the number of voters participating in direct legislation?
18. Outline any other objections to the system.
19. Explain the chief arguments advanced by its advocates.
20. Give your own impressions as to the relative weight of the objections and supposed advantages.
21. Outline some uses of direct legislation in your State constitution.
22. In your local government.
23. How does it affect party ties and why?
24. Get the opinion of a political worker on direct legislation.
25. What is the recall?
26. To what extent has it been adopted? Can it be applied to appointed officials? Explain its relation to the short ballot.
27. Have you a legislative referendum in your State? If so how would you proceed to have a law referred?

28. What are your impressions as to the advisability of calling on the voter for action more or less frequently? Reasons.
29. Prepare an essay on results of Direct Legislation, showing how far the system has realized the advantages claimed for it.
30. Resolved, that the recall of State officers except judges should be adopted in this State. Take either side.
31. Resolved, that the recall of judges should be adopted in this State. Take either side.
32. Resolved, that the recall of judicial decisions should be adopted in this State. Take either side.
33. Explain the difference between the two principles of direct legislation and short ballot respectively.
34. Secure a list of the officers chosen at the last election in your State and city. Ask a few voters the names of the men chosen to these offices and report what percentages of officials' names were known.
35. Secure a copy of a "sample" ballot used at the last election in your election district. Report on the number of offices to be filled at the election and the number of names on the ballot.
36. Ask several voters in your district why they favor voting on so many elective positions, and give your impressions as to the force and strength of their replies and arguments.
37. Explain fully with examples from your own city or election district what advantage it is to the political leader to have a large number of elected offices.
38. Summarize briefly the proposal for the short ballot.
39. Explain its adoption in Galveston, with reasons.
40. The results in Galveston.
41. Outline the present extent of the short ballot plan in the city governments of the country, and contrast briefly the organizations of two cities, one under the old system and one under the commission plan.
42. Explain the advantages of the Dayton system, showing its difference from commission government.
43. How does the Dayton method make use of the short ballot?
44. Make a draft or plan showing how the short ballot idea could be applied in your State government.
45. Why has the principle appealed to men of different political beliefs? Mention some examples.
46. Why has it not been adopted in the State governments? How does it fit in with the proposals made by Governors Hunt and Hodges, for the re-organization of State government on more simple and effective lines?
47. Resolved that the Short Ballot principle should be applied in the local and central offices of the government of this State. Defend either side.





## APPENDIX A

### CONSTITUTION OF THE UNITED STATES\*

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

#### ARTICLE I

SECTION 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2. 1. The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

2. No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

3. Representatives and direct taxes<sup>1</sup> shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons.<sup>2</sup> The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each State shall have at least one representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

4. When vacancies happen in the representation from any State, the

\* Adopted by the Constitutional Convention in 1787, ratified by State conventions in 1789.

<sup>1</sup> See the 16th Amendment, below, p. 641.

<sup>2</sup> Partly superseded by the 14th Amendment. (See below, p. 640)

executive authority thereof shall issue writs of election to fill such vacancies.

5. The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

SECTION 3. 1. The Senate of the United States shall be composed of two senators from each State, chosen by the legislature thereof, for six years; and each senator shall have one vote.<sup>1</sup>

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.<sup>1</sup>

3. No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

4. The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

5. The Senate shall choose their other officers, and also a president *pro tempore*, in the absence of the Vice President, or when he shall exercise the office of President of the United States.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the chief justice shall preside: and no person shall be convicted without the concurrence of two thirds of the members present.

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

SECTION 4. 1. The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION 5. 1. Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.

<sup>1</sup> See the 17th Amendment, below, p. 641.

2. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

3. Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one fifth of those present, be entered on the journal.

4. Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

SECTION 6. 1. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

2. No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.

SECTION 7. 1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

2. Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

3. Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION 8. 1. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

2. To borrow money on the credit of the United States;

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

4. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

6. To provide for the punishment of counterfeiting the securities and current coin of the United States;

7. To establish post offices and post roads;

8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

9. To constitute tribunals inferior to the Supreme Court;

10. To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

13. To provide and maintain a navy;

14. To make rules for the government and regulation of the land and naval forces;

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

SECTION 9. 1. The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

2. The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.
3. No bill of attainder or *ex post facto* law shall be passed.
4. No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.<sup>1</sup>
5. No tax or duty shall be laid on articles exported from any State.
6. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another: nor shall vessels bound to, or from, one State be obliged to enter, clear, or pay duties in another.
7. No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.
8. No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

SECTION 10. 1. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

2. No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

3. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

## ARTICLE II

SECTION 1. 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows:

2. Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress: but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

<sup>2</sup>The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of

<sup>1</sup> See the 16th Amendment, below, p. 641.

<sup>2</sup> The following paragraph was in force only from 1788 to 1803.

the number of votes for each ; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the Senate. The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President ; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote ; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice President.<sup>1</sup>

3. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes ; which day shall be the same throughout the United States.

4. No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President ; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

5. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

6. The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

7. Before he enter on the execution of his office, he shall take the following oath or affirmation : — " I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. 1. The President shall be commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have

<sup>1</sup> Superseded by the 12th Amendment. (See p. 639.)

power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION 3. 1. He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION 4. The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

### ARTICLE III

SECTION 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

SECTION 2. 1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; — to all cases affecting ambassadors, other public ministers and consuls; — to all cases of admiralty and maritime jurisdiction; — to controversies to which the United States shall be a party; — to controversies between two or more States; — between a State and citizens of another State; <sup>1</sup> — between citizens of different States, — between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court

<sup>1</sup> See the 11th Amendment, p. 639.



ARTICLE

SECTION 1. Full faith and credit public acts, records, and judicial proceedings of every State shall be given in every other State. Congress may by general laws prescribe the manner in which and the extent to which such acts, records, and proceedings shall be proved, and the effect thereof.

SECTION 2. 1. The citizens of each State shall have the same rights and immunities of citizens in the several States.

2. A person charged in any State with crime shall not flee from justice, and be found in another State, and removed to the State having jurisdiction of the crime.

3. No person held to service or labor in any State, escaping into another, shall, in consequence of such escape, be discharged from such service or labor of the party to whom such service or labor is due.

SECTION 3. 1. New States may be admitted by the Congress into this Union; but no new State shall be formed by the separation of any other State; nor any State be formed by the joining two or more States, or parts of States, without the consent of the Congress, as well as the States so concerned, as well as of the Congress.

2. The Congress shall have power to dispose of and regulate the territory or other property of the United States; and nothing in this Constitution shall be construed to prejudice any claims of the United States against any other State.

SECTION 4. The United States shall guarantee to every State a republican form of government, and shall protect each State against invasion; and on application of the legislature (unless the legislature cannot be convened) against domestic violence.

posing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

## ARTICLE VI

1. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

3. The senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

## ARTICLE VII

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same. Done in Convention by the unanimous consent of the States present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names,

GO: WASHINGTON —  
Presid. and Deputy from Virginia

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Articles in addition to, and amendment of, the Constitution of the United States of America, proposed by Congress, and ratified by the legislatures of the several States pursuant to the fifth article of the original Constitution.

ARTICLE I<sup>1</sup>

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

<sup>1</sup> The first ten Amendments adopted in 1791.

The right of the people to be secure in effects, against unreasonable searches and no warrants shall issue, but upon probable c tion, and particularly describing the place t things to be seized.

#### ARTICLE

No person shall be held to answer for crime, unless on a presentment or indictment arising in the land or naval forces, or in the time of war or public danger ; nor shall any offense to be twice put in jeopardy of life or any criminal case to be a witness against himself or property, without due process of law ; no for public use without just compensation.

#### ARTICLE VI

In all criminal prosecutions, the accused shall have a public trial, by an impartial jury of the crime shall have been committed, which district certain by law, and to be informed of the tion ; to be confronted with the witnesses against him ; to have process for obtaining witnesses in his favor, counsel for his defense.

#### ARTICLE VII

In suits at common law, where the value in dollars, the right of trial by jury shall be preserved, shall be otherwise reExamined in any court of ing to the rules of th

## ARTICLE IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

## ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI<sup>1</sup>

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

ARTICLE XII<sup>2</sup>

The electors shall meet in their respective States, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots, the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice President shall be the Vice President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.

<sup>1</sup> Adopted in 1798.

<sup>2</sup> Adopted in 1804.

ARTICLE XIII<sup>1</sup>

SECTION 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV<sup>2</sup>

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a senator or representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV<sup>3</sup>

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

<sup>1</sup> Adopted in 1865.

<sup>2</sup> Adopted in 1868.

<sup>3</sup> Adopted in 1870.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XVI<sup>1</sup>

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

ARTICLE XVII<sup>2</sup>

The Senate of the United States shall be composed of two senators from each State, elected by the people thereof, for six years ; and each senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the Constitution.

<sup>1</sup> Passed July, 1909; proclaimed February 25, 1913.

<sup>2</sup> Passed May, 1912, in lieu of paragraph one, Section 3, Article I, of the Constitution and so much of paragraph two of the same Section as relates to the filling of vacancies; proclaimed May 31, 1913.



## APPENDIX B

### "DISTRUST OF STATE LEGISLATURES. THE CAUSE; THE REMEDY"

GOVERNOR GEORGE H. HODGES OF KANSAS

PROCEEDINGS, CONFERENCE OF GOVERNORS

COLORADO SPRINGS, 1913.

"The thing we seek is a representative and efficient legislature, one that is at all times responsive to the public will and weal, and just because the two-house system has too often been neither representative, nor efficient, nor responsive, dissatisfaction with it has become wide-spread. Constitutional Convention after Constitutional Convention has exhausted its ingenuity in devising new restrictions on its power for evil and the end is not yet. The new Commission form of Government is the out-growth of this dissatisfaction with that phase of our present legislative system, which involves the unit system of representation, which does not represent. Not very long ago, two constitutional amendments were adopted by the people of Kansas for this very purpose—one of which gives to the Governor the power to veto any item in an appropriation bill without being compelled to disapprove of the entire act; and the other making it a matter for judicial, instead of legislative determination, whether an act is special within the constitutional prohibition against that sort of legislation.

"The first of these amendments was made necessary by the practice of inserting in appropriation bills, items for unnecessary purposes, amounting in many cases to a graft pure and simple, or the allowance of unjust claims against the State in the miscellaneous appropriation bill. Many of these claims, it was found, had reappeared after a few years, and had been allowed a second time.

"The second amendment referred to was made necessary by the continual flood of special acts which were passed by the legislature notwithstanding the constitutional prohibition against such legislation. And I regret to say that even this amendment has not remedied the evil.

"Last year, both the great political parties in Kansas pledged themselves to submit to the people an Initiative and Referendum amendment to our constitution at the general election to be held in 1914. A joint resolution submitting an effective Initiative and Referendum passed the State Senate with the necessary two-thirds vote. This resolution failed in the House of Representatives, because certain members of that body who are pleased to style themselves 'Progressives' permitted themselves to be bound hand and foot by a caucus agreement to vote against it. When this sort of thing happens, it is little wonder that the distrust of our State legislatures as now constituted, has become wide-spread. The fact that in many States the Initiative and Referendum has been adopted, and is being demanded in many more, is of itself but a manifestation of distrust. It is an evidence that the people themselves are reaching out after a more representative, responsible, and efficient instrumentality for the making of laws.

"After all the amending of constitutions, the bicameral legislature remains a heavy and complicated mechanism, yielding quickly enough to the operation of the political expert, but blocking at every turn the attempts of the people to work it honestly and efficiently, and it has been said that by a strange perversity of fate, the fear of democracy and the passion for democracy have contributed



equally to this result. Powerful, private interests find their best shelter behind the multiplicity of barriers, and politicians have no desire to make plain the rules of the game, while reformers generally attack corruption or inefficiency by adding some new office or board of control. And so it has come about that the people have been unable to maintain control over their own government, and it has fallen more and more completely into the hands of the professional politician, aptly described as 'One who knows more about the voter's political business than the voter does himself.'

"Cumbersome and complicated legislative machinery—following the law that everything produces after its kind—has resulted in cumbersome and complicated legislation. Crude or complicated laws of necessity require interpretation and even the lawyer finds himself all but submerged by the flood of judicial decisions, interpreting these laws, which the court turns out annually.

"There appears to be no good reason why our laws should not be written in simple and direct language, expressing so clearly their purpose, that a man of average intelligence may understand what is meant.

"Take for example the famous Sherman act, with which the Federal Courts have wrestled for years, and have written volumes of interpreted decisions—and the end is not yet. And so it is in almost every important law on the statute books of either state or national government.

"If the sovereign voter is ever to reach the goal of representative, responsible and efficient government, it must be thru such a *simplification* of our legislative machinery as will permit the electorate to bring *steady and persistent pressure* on this great organ of government, in the broad day-light of interested public discussion and to *fix the responsibility* for any failure on the part of any member of the legislative body, to respond to the will of the majority of the people.

"In an address delivered some years ago, President Wilson said:

"Elaborate your government; place every officer upon his own dear little statue; make it necessary for him to be voted for, and you will not have a democratic government. Just so certainly as you segregate all these little offices and put every man on his own statuary pedestal and have a miscellaneous organ of government, too miscellaneous for a busy people either to put together or to watch, public aversion will have no effect upon it; and public opinion, finding itself ineffectual, will get discouraged, as it does in this country, by finding its assaults like assaults against battlements of air, where they find no one to resist them, where they capture no positions, where they accomplish nothing. You have a grand housecleaning; you have a grand over-turning,—and the next morning you find the government going on just as it did before you did the over-turning. What is the moral? . . . The remedy is contained in one word: *Simplification*. Simplify your process, and you will begin to control. Complicate them and you will get farther and farther away from their control. Simplification! Simplification! Simplification! is the task that awaits us. To reduce the number of persons to be voted for to the absolute workable minimum—knowing whom you have selected, knowing whom you have trusted, and having so few persons to watch, that you can watch them.'

"This language applies with a special force to our present two-house legislative system. When a desirable measure fails to pass, or an undesirable measure passes, there is no way whereby the public can single out a particular member of the legislature and say, 'You, personally, are principally to blame in this matter.' Not only is it almost impossible to locate the man who is to blame, but often when he can be located, it is very probable that the voters in his district are not particularly concerned about what he has done, although his action may be of great importance to the State as a whole, while he is responsible to nobody except his own local constituents.

"One county in our State has no public or privately owned utilities. Its representative received one hundred and eighty-eight votes, and while his party declared for a Utilities Commission law, he voted against his party pledge, because it raised the taxes. Another member of the same party received four thousand votes—his county recognized the necessity of the enactment and he supported the measure. It takes a decided stretch of imagination to recognize a

truly representative body, wherein the power of one hundred and eighty-eight votes in one county, equal four thousand in another.

"This system of scattered responsibility puts the very smallest incentive upon the individual to accomplish effective results. Not only can he divide the blame with all the rest of the majority, but he can offset it entirely by bringing forward some local excuse or seeming justification. He can point to something else he has done which was of particular interest to his constituents and thereby avert any embarrassing consequences for a mistake or misdeed of profound importance to the state as a whole, if indeed under the present system he is capable of accomplishing anything.

"Our legislatures are for the most part limited to short sessions and the terms of the members of the House do not as a rule cover more than one session. Generally, an overwhelming majority of the House of Representatives are first-termers, and without legislative experience. The same thing is often true of the Senate.

"And yet, legislatures so composed, add something like 25,000 pages to our statute books each year. In Massachusetts this year not less than 2,500 bills were introduced. In Pennsylvania, 2,100; in Wisconsin, 1,200; and in the State of Washington, 1,200.

"In 1911 the Session Laws of California was a book of 2,000 printed pages; the Session Laws of Connecticut, 360 pages; Idaho, 810 pages; Indiana, 705 pages; Maine, 820 pages; Massachusetts 1,100 pages; Michigan, 533 pages; Missouri, 451 pages; New Jersey, 834 pages.

"The Session Laws of Kansas for 1913 is a book of 504 pages and contains 376 laws and resolutions. Excluding appropriation bills, 36 important new laws were passed. The rest were either local acts, amendments, or were trivial in their nature. The last Kansas legislature was in session 49 days or parts of days, consequently something like 7 laws passed both Houses each day.

"It is hardly possible for a member to read 7 enactments a day, and it is an impossibility for him to comprehend and understand them. It must be remembered, however, that something like 1,700 bills were introduced and several hundred of these were reported by committees and that a great deal of time was occupied in considering bills which were ultimately killed in one House or the other.

"In the closing days of the session—as in all legislatures—there was law-making in hot haste and bills were rushed through under omnibus roll-calls, and the result was a lot of more or less crude and illy-digested laws, some of which are puzzles for even learned jurists to interpret with anything like satisfaction to themselves or to the public.

"Notwithstanding the fact my executive clerk and the Attorney General did their best to scrutinize all the bills, Chapters 177 and 178, and Chapters 174 and 175, respectively, are duplicates. Chapter 75 of the Laws of 1911 was repealed three times—first by Section 3 of Chapter 75 of the Laws of 1913; by Section 2 of Chapter 123 of the Laws of 1913; and then by Section 7 of Chapter 124 of the Laws of 1913. Chapter 318 of the Laws of 1913 was immediately amended by Chapter 319 of the Laws of 1913. Chapter 82 of the Laws of 1911 was repealed by Section 7 of Chapter 89 of the Laws of 1913, and after being repealed was then amended and repealed by Chapter 108 of the Laws of 1913.

"A great many legislative sins are committed by the omnibus method. Measures that meet the positive disapproval sometimes of a majority of the House or Senate, are omnibussed, when if considered separately in either body, their passage would be impossible.

"I know of enactments upon the statute books that, after passing one branch of the legislature, were objected out of an omnibus reading and roll call and were never voted on in the Senate at all, but were shown afterwards by the Journal as having passed the Senate in the usual legal way. The "omnibus" method would be impossible with a single-house legislature of few numbers.

"Much time was given to the passage of a bill relating to the practice of Chiropractic—whatever that is. I let this bill become a law without my signature, but on examination found that it required me to appoint as members of a

board, three Chiropractors who had practiced their art in Kansas for two years past. In order to comply with this provision of the law, I would have been compelled to appoint men or women who had been openly violating the Medical Registration laws of our State for two years—a thing which, as Governor, I refused to do.

"The law governing the inspection of hotels and lodging houses contains this provision: 'All carpets and equipment used in offices and sleeping rooms, including walls and ceiling, must be well plastered and be kept in a clean and sanitary condition at all times.'

"For six years there stood upon our statute book as a part of the law regulating automobile traffic on the public highways, the following—which was doubtless added by some hilarious politician who was impressed by the 'band wagon' idea of party management:

"'Nothing in this section shall be construed as in any way preventing, obstructing, impeding, embarrassing, or in any other manner or form, infringing upon the prerogative of any political chauffeur, to run an automobile band-wagon at any rate he sees fit, compatible with the safety of the occupants thereof; provided, however, that not less than ten nor more than twenty ropes be allowed at all times to trail behind this vehicle when in motion, in order to permit those who have been so fortunate as to escape with their political lives, an opportunity to be dragged to death; and provided further, that whenever a mangled and bleeding political corpse implores for mercy, the driver of the vehicle shall, in accordance with the provisions of this bill, "Throw out the life-line."'

"Here is another illuminating one:

"'If any stallion or jack escape from his owner by accident, he shall be liable for all damages, but shall not be liable to be fined as above provided.'

"By being somewhat heedless to the ordinary rules of grammar, some court might decide that it was the owner and not the stallion or jack who is made liable for damage under this act.

"I am told that in the early days of Oklahoma, a compilation of the laws of this Prairie State included a full set of regulations for the government of harbors, wharfrage, and lighthouses, taken bodily from the regulations enacted by the Texas legislature for its Gulf ports.

"Another law sent to my office for signature was found on examination to contain a negative which made the act exactly contrary to what it was intended to be. This bill was only one of fifteen others which were returned to the legislature by me for correction in particulars more or less important. Two bills which were exact duplicates, each of the other, passed both Houses and came to my desk before the duplication was discovered.

"I am informed that exactly the same thing happened this year in Pennsylvania. And in one instance a bill was passed amending another act which had been passed some days previous, and both the original act and the amendment were enrolled and reached my office about the same time. A number of bills passed both Houses without any enacting clauses—a matter absolutely requisite to their validity as laws, and in the Session Laws will be found a large number of resolutions authorizing corrections in a number of acts.

"Notwithstanding the constitutional prohibition against special legislation, many acts were in fact special, although they have the form and appearance of being of general application. On the other hand, by reason of time taken up in discussing and passing worthless legislation, like the Chiropractic Bill, and the Pure Shoe Bill, legislation of the utmost importance was pushed over until the last days of the session, when there was not time for even a pretense of discussion or deliberation, and accordingly failed of enactment. Among these important measures was a Grain Inspection Bill, the Kincaid Bridge Bill, a Collateral Inheritance Tax, a Recording Mortgage Tax Bill, and a bill prohibiting the foreclosure of mortgages, until the owner and holder should either pay, or show that he had paid, all taxes that might lawfully have been assessed against it from its date.

"With all that, the Kansas legislature of 1913 was as efficient, as capable, as right and honest as any legislature that ever sat; it passed many wholesome

laws. There was not a single suspicion of corruption. It was as good a legislature as can be gotten together under the bicameral system, but it requires *much more than honesty* to make laws for a State. Effective work in a legislature can only be done by a man of experience, notwithstanding the best of intentions. A district can be effectively represented only by a man who is able to accomplish results.

"What is commonly called the *technical* part of legislation, is incomparably more difficult than what may be called the *ethical*. In other words it is far easier to *conceive* justly what would be useful law, than so to *construct* that same law, that it may accomplish the design of the law giver.'

"To illustrate this, take the case of the member who is quoted as saying, 'When I came to the legislature I introduced a bill to prohibit the manufacture of *filled* cheese. It would have done it all right, but it would have prevented the manufacture of all other kinds of cheese too.' Or take the case just cited of the act, which provides for the 'plastering of carpets and furniture.'

"But these are simply examples of unintentional, legislative humor. The *serious* side of the question appears, if one visit our state library, with its hundreds of volumes of court decisions made necessary by the work of inexperienced and untrained legislators.

"I have seen bills carefully drawn by experts after months, or perhaps years of the most painstaking and careful study of the subject, amended on the floor of both House and Senate in a rapid-fire sort of way, by men who had never given an hour's consideration to the subject-matter, and in the end have seen what might have been a useful law, either weighted down with amendments which caused friends of the original bill to vote against it, or have seen the bill become a law, so amended as to be unrecognizable by the man who introduced it, and its effectiveness frittered away, because some Senator or Representative possessed an inordinate desire to put himself in evidence, no matter how.

"The Anti-pass Law, now upon our statute books, was re-written on the floor of the Senate—a make-shift sort of a measure was reported for passage and an attempt made to 'railroad' it through. A minority became acutely alive to the situation and, helped by the presence of a crowded Senate, they substituted, section by section, until the measure became a splendid enactment. It was a dangerous way to pass a measure of so great importance, but the exigency of the moment demanded heroic action.

"If it was the intention of our Constitution makers that the bicameral system of legislation, which now prevails, should be a system both representative and deliberative, they have utterly failed to secure that result under the present system. As a matter of fact, the average member of the legislature, and especially of the House of Representatives, does not even represent the people of his own little district. And unless he happens to be one of the very few leading spirits who run the legislature, about all the new member is good for is to vote as he is told.

"Those of us who have legislative experience, know that this is true in varying degrees of almost every State legislature, and I am told that it is *largely true* of the membership of our National Congress, and yet so *strong* is the *veneration* for *ancient institutions*, that many well-intentioned men—to say nothing about the politicians—regard any proposition to do away with this *inefficient* and *unwieldy* system as little short of treason, and denounce a proposal for the substitution in its stead of a single legislative body; so small in number that the people may know whom they have selected and whom they have trusted, and having so few to watch, that they can watch them. These men are honestly conservative, and are hoping against hope for the realization of an ideal—which the *realities of experience* have demonstrated to be *impossible*, and these conservative gentlemen sometimes become classical in their diction and charge those of us who are disposed to be progressive, with attempting to establish an oligarchy.

"One of the stock arguments in favor of the bicameral system is that the *second chamber* is a valuable check on bad legislation because there are *two bodies* through which the bill must pass. From personal legislative experience, I know how farcical this contention is. About the only purposes I have ever been able

to see for the two-house system is, that it enables a legislator to fool his constituents, by getting a measure demanded or promised them through his branch of the legislature, and then using every effort to have it killed in the other branch. Six years ago a resolution passed the House by a goodly two-thirds majority, submitting to the voters the Equal Suffrage amendment to our Constitution. Before the resolution reached the Senate, fifty per cent of the House members were importuning their senators to defeat the resolution, and the Senate, in duty bound, followed their importunities. The *same impediment* which the *existence of two chambers* offers to bad measures, also applies to good ones.

"Let us take the last session of the Kansas legislature. So far as I now recall, no very objectionable bills passed either House, but a number of very meritorious bills were actually defeated after having passed one chamber or the other. For example: The resolution to submit an Initiative and Referendum amendment to the Constitution, promised by all parties, passed the Senate and failed to get the necessary two-thirds vote in the House, because the minority members of the House preferred to engage in the pass-time of playing politics. A Recording Mortgage Tax law was passed by both Chambers, went to Conference, and failed because the Conference Committees would not agree. The Grain Inspection law suffered the same fate. The Kincaid Bridge Bill—one of the most meritorious bills introduced during the session, passed the House and was lost in the Senate. The Collateral Inheritance Tax Bill passed the House and was defeated in the Senate. Several other meritorious measures failed to become laws, because of a feud between a senator and a leading member of the House, to which in a sort of an unconscious way, the members of the House and Senate became partisans. And that sort of thing has happened in other legislatures to my certain knowledge, so that if the bicameral system serves as a check to bad legislation, it also serves as a check to good legislation.

"It is claimed for the bicameral system that it destroys the evil effects of sudden and strong excitement and of precipitate measures, springing from passion, caprice, personal influence and party intrigue. There are possibly occasions when the bicameral system would be advantageous in this respect, but they are not met with in the study of a normal legislative session. To be a check upon such excitement, passions and intrigues, it is important that the *second* House be not *subject to the same influences*. If we take the New York legislature as an example, there appears to be little force in this argument, for with no cause for sudden excitement, passion, or intrigues, in the year 1910, one hundred and thirty bills were recalled from the Governor by the legislature of that State after having passed both Houses.

"Then there is the argument that it is more difficult to corrupt or *wrongfully* influence two bodies than one. The *test* of legislative efficiency is the *ability* to effect positive enactments. A good measure opposed by special or predatory interests, may as easily be defeated under the bicameral system as under a one-house system, because all that is necessary, is for the opponents of the measure to control one House, and in cases of that kind, the special interest has *two* chances with the *bicameral* system to one with the other. Indeed the lobbyist and representative of corporations *first* attempt to defeat a measure objectionable to them in the committee, and if they fail there, then they concentrate their assault on the members of whichever House there appears to be the best chance of success in blocking the proposed legislation.

"Then again it is said that under the bicameral system there will be a jealous and critical revision of all proposed laws by a rival body of men, though it would be difficult to produce evidence to show when they are either rival or jealous.

"Generally speaking, the two Houses do a lot of trading; the first House in order to get anything, accepts the amendments of the second, and vice versa. In actual practice, the two Houses seldom seek a middle ground, at least not by formal methods. Two considerations do not necessarily mean a double consideration and *two hasty* considerations may not be as good as *one thorough* one. There is a tendency to assume that a subject has been considered in the *other House*, when the consideration there has been very inadequate, or *sometimes one House* hastily passes a bill, with the expectation, that the *other House* will

deal with it more carefully; and so there is frequently a shifting of responsibility from chamber to chamber. It is customary for amendments of the second House to be accepted without question. It is also customary to advance bills advocated by the party leaders. Important measures are determined upon by the party leaders, and upon these the second chamber is of little additional usefulness in furnishing consideration.

"Toward the close of each session, a committee on revision of the calendar is appointed. The membership of this committee is always dictated by the party leaders and they absolutely determine what bills shall be considered, and the order in which they shall be considered.

"This committee usually consists of three in the Senate, and five in the House, and these eight men during the last week of the session, when almost fifty per cent of the bills are passed, absolutely dictate what enactments shall comprise one-half of the laws upon our statute books. The committee becomes in reality, a bicameral legislature of three and five members. And the House, in order to get its bills passed by the Senate, accepts Senate bills; and the Senate in order to get its bills passed by the House, accepts House bills.

"Those of us who have had legislative experience, are fully aware that many an important bill has been killed in one House or the other, just because of a feeling that the Senate was killing House bills too carelessly; or that the House was killing Senate bills with too great frequency. As for being a *deliberative* body, I have yet to see a State legislature that could be so classed.

"And pertinent to this remark is the criticism which I take from the *Saturday Evening Post* of August 9th, 1913. The *Post* says:

"The Illinois Legislature was in session twenty-three weeks. A contemporary on the ground reports that in the first twenty-one weeks it passed one-quarter of the bills that it finally made into law and in the last two weeks it passed three-quarters of them. That is the inevitable legislative program; two or three months of preliminaries, appointing committees, playing politics, squabbling over points of party advantage; then two or three weeks of earnest effort to get the machinery really started; then about ten days of frenzied haste, during which a large part of the important legislation is actually accomplished.

"A body constituted as our legislatures are, cannot possibly work any other way. There would be exactly the same result with a bank or a railroad, if once in two years the stockholders elected a large body of directors who mostly knew nothing in particular about banking or transportation, who were sharply divided by opposing professional interests and who were to remain in session only three months. But the bank or railroad wouldn't last long under the guidance of such a board.

"We legislate in convulsions when we legislate at all. The organism is so constituted that it must have a fit or lie dormant.

"It is not a representative system. The people of Illinois do not conduct their personal affairs in rare bursts of frenetic energy divided by long periods of torpidity. No farmer hires thirty men to debate about small grain from July 4th to July 30th and then harvest the oats on the 31st. Why should he regard a legislature which operates that way, as representing him?"

"In my message of March 10, 1913, I proposed to the Kansas legislature the substitution for the present system, of a one-house legislature consisting of eight and not to exceed sixteen members. My most violent critic has proposed a one-house legislature composed of thirty. I still believe that the number should not exceed sixteen. One-half of them might be elected from districts and one-half of them at large, or they might all be nominated by districts and elected at large, with provisions for recall, and the initiative and referendum, which are imperative. These legislators should be elected for terms of four years each, with provision for expiration in rotation, in order to secure stability and experience.

"I further believe that these legislators should be nominated and elected upon a non-partisan ballot, like that which has recently been provided in Kansas for the election of judges; or if not that, then with provision for minority representation.

"They should be paid salaries which would enable them to give their time to the study of State affairs. They should meet at such intervals as the business of the State demanded and should have power to employ expert assistance in the drafting of laws.

"Just at this time the necessity for such a legislative body is quite apparent in Kansas. Such a legislature would enable us to handle the gas situation; it would have enabled us to handle the situation with reference to the inspection of grain; it would have enabled us to handle without trouble, the difficulties arising from the destruction of our twine plant at the Kansas Penitentiary. It would enable us to provide aid for those counties which have been sorely afflicted by the drouth; and so every year, such a body able to meet without large expense whenever necessity required, would be a good business proposition for the people of the State. As it is, one co-ordinate branch of the State government is absolutely abandoned for a whole biennium, unless the legislature is invoked in an expensive, extraordinary session by the Governor. It is as if the head of an important department of some other big business should give only fifty days every two years to its management.

"In my judgment, such a legislature as I am advocating, would give us fewer but better laws; it would give us laws that would need less interpretation from the courts and accordingly give us less litigation. It would be representative. As a matter of fact, under the present system, the sovereign voter helps elect one representative out of one hundred twenty-five, and the one senator out of forty, and if his senator and representative happen to disagree, he is *not represented at all*. Under the one-house system, elected as I have proposed, each voter would cast his vote for either eight or all sixteen members, according to the method adopted. He can watch eight or sixteen, and if he is alert, he may know from the daily newspapers on which one of them to fix the responsibility for any particular action, but he cannot keep track of 165.

"Democracy does not mean numbers, but that which is more flexible, the more responsive to the will of the people is the more democratic. Eight or sixteen men, who sense their responsibility, and accountability, and who—so to speak—feel the grip of an exacting public, will be far more democratic, far more solicitous of public approval, and much more sensitive to public criticism, than they would have been, had they been but a part of a legislature of two Houses of 165 members.

"And this brings me to the matter of publicity. I would have published and distributed at State expense, a journal of the proceedings of this House so that every voter in the State, if he care, may know just what is going on.

"I have not at any time proposed, as I have been credited with doing, commission form of government for the State. When it is attained, I think it must be step by step, and so my proposition is for a small, single-house legislature as the first step. If it prove a success, it will then be time to consider the question of taking another step. What we now want is a legislature in which there will be real deliberation and real responsibility, and real accountability. What we want is legislation by members adequately equipped, and adequately paid to legislate. Men who will promulgate new law only when needed. We want a better system which will bring into service better, though fewer men, and give us better, though fewer laws.

"Since this address was prepared, I have received from Richard S. Childs, secretary of the National Short Ballot Organization, the result of his examination of the manuscript, for a bulletin shortly to be issued by the Kansas Legislative Reference Library on this subject. This bulletin embodies all the available literature on this subject, both favorable and unfavorable. A summary of Mr. Childs' conclusions is as follows:

"First. Membership in a small one-house legislature would be more attractive to first-class talent, than membership in Congress and would rank not far below the Governorship itself.

"Second. This plan would bring the legislature nearer to the people. This statement contradicts the first impression, but it is *true* nevertheless. The legislature of to-day is as *remote* from the people as it is possible to be. The

people may rage and storm over some bill that has been passed or turned down, but the individual members of the legislature are shielded from blame, by the simple fact that each member is safely lost in the shuffle. In a legislative body with sixteen members, the newspapers would publish the roll calls on all important bills and the people would have a clear picture of the kind of man who was representing them and the way he was behaving.

"Third. The proposition would make the legislature more responsive and obedient to public opinion.

"Fourth. A sixteen-member legislature would be harder to corrupt. This also contradicts first impressions. There are many who believe that the more people there are to pass upon a measure, the harder it is to pass a bill by bribery. Just the reverse is true. The more conspicuous a man is before the public, and the more clearly his responsibility is appreciated by the people, the harder it is for him to go wrong. Turn the limelight strong upon a man and make him feel that he is performing before a big and important audience, and he will be hard to corrupt. *Light is as salutary in politics as in hygiene.*

"What reason is there, may I ask, for adhering to antiquated methods in conducting the great business of the State, when in every other department of human activity, newer, more efficient and more economical methods, have been and are constantly being adopted?

"Reasonable conservatism is a good thing, but let it be progressive conservatism. Let us adopt, in the management of the public business, the *progressive policies that every other big business is adopting in the conduct of its affairs.*

"As I have already said, I am not advocating at this time the adoption of a commission form of government for the State, but the adoption of a small, one-house legislature, retaining the present separation of legislative, executive, and judicial powers. If this step shall prove successful, we may then, if necessary, consider further changes.

"I have not attempted to hurry the people of my State into the adoption of any proposition. I have asked them to take it into consideration and discuss it for the next two years. I do not want to make it a party issue. I want it discussed and acted upon as an *economic question* after full and fair discussion by the men and women of all parties. I believe that such an amendment to our constitution will be submitted and adopted within the next few years, and that it will give to the people that which they never had before in any true sense—a legislature that is in a true sense *representative* and one which will be quickly responsive to the will of the electorate and accountable to the public in the most exacting sense."

## THE SHORT BALLOT

### A MOVEMENT TO SIMPLIFY POLITICS

BY RICHARD S. CHILDS

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#### I

Do you know that ours is the only habitually misgoverned democracy? Other democracies, Canada and the English, French and German cities, are generally well-governed, many of them splendidly governed. Their councils and legislatures stay clean for decades automatically without need for public uprisings to clean them out. True they sometimes suffer from graft but it is local, haphazard and unorganized like graft in business life. But with us misgovernment is universal and ever-present. Every State and every City is constantly at war with it. The brand-new City of Gary begins to grapple with it as soon as there is an election. And the success of the forces of righteousness is always temporary like sweeping back flooding water with a broom. We say truly "A reform



administration is never re-elected." Good administration is actually abnormal in American cities and states. Mal-administration is the normal.

This condition, unique among democracies, indicates the existence of some peculiarity in our system of government as the underlying cause.

#### ANALYSIS OF PRESENT CONDITIONS

##### *Blind Voting*

Starting at the broad base of our structure, the voters, we notice one unique phenomenon which is so familiar to us that we usually overlook it entirely—that is *our habit of voting blindly*. Of course intelligent citizens do not vote without knowing what they are doing. Oh, no! You, Mr. Reader, for instance, you vote intelligently always! Of course you do! But whom did you vote for for Surrogate last time? You don't know? Well then, whom did you support for State Auditor? For State Treasurer? For Clerk of the Court? For Supreme Court Judge? And who is your Alderman? Who represents your district at the State Capitol? Name, please, all the candidates you voted for at the last election. Of course you know the President and the Governor and the Mayor, but there was a long list of minor officers beside. Unless you are active in politics I fear you flunk this examination. If your ballot had by a printer's error omitted the "State Comptroller" entirely, you would probably not have missed it. You ignored nine-tenths of your ballot, voting for those you did know about and casting a straight party ticket for the rest, not because of party loyalty, but because you did not know of anything better to do. You need not feel ashamed of it. Your neighbors all did the same; ex-President Eliot of Harvard, the "ideal citizen," confessed in a public address recently, that he did it, too. It is a typical and universal American attitude. We all vote blindly. Philadelphia has even elected imaginary men. The intelligence of the community is not at work on any of the minor offices on the ballot. The average American citizen never casts a completely intelligent vote.

Do you know the name of the new State Treasurer just elected? . . .	No 87%
Do you know the name of the present State Treasurer? . . . . .	No 75%
Do you know the name of the new State Assemblyman for this district? . . . . .	No 70%
Do you know the name of the defeated candidate for Assemblyman in this district? . . . . .	No 80%
	(Knew both of above 16%)
Do you know the name of the Surrogate of this County? . . . . .	No 65%
Do you know the name of your Alderman? . . . . .	No 85%
Do you know whether your Alderman was one of those who voted against the increase in the Police Force last year? . . . . .	No 98%
Are you in active politics? . . . . .	No 96%

The intelligence (?) of voters in the most independent Assembly District in Brooklyn. Data collected immediately after election, 1908.

##### *Should We Blame the Voters*

This is not all the fault of the voter. To cast a really intelligent ballot from a mere study of newspapers, campaign literature and speeches is impossible because practically nothing is ever published about the minor candidates. And this in turn is not always the fault of the press. In New York City the number of elective offices in State, City and County to be filled by popular vote in a cycle of four years is nearly five hundred. In Chicago the number is still greater. Philadelphia, although smaller than either city, elects more people than either. No newspaper can give publicity to so many candidates or examine properly into their relative merits. The most strenuous minor candidate cannot get a

hearing amid such clamor. And the gossip around the local headquarters being too one-sided to be trusted by a casual inquirer, a deep working personal acquaintance with politics, involving years of experience and study, becomes necessary before a voter can obtain the data for casting a wholly intelligent ballot.

Plainly the voter is over-burdened with more questions than he will answer carefully, for it is certain that the average citizen cannot afford the time to fulfill such unreasonable requirements. The voters at the polls are the foundation of a democracy and this universal habit of voting blindly constitutes a huge break in that foundation which is serious enough to account for the toppling of the whole structure. Let us see if we can trace out a connection between this as a cause and misgovernment as the effect.

#### *Blind Voting Leads to Government by Politicians*

No one will deny that if nine-tenths of the citizens ignored politics and did not vote at all on election day, the remaining tenth would govern. And when practically all vote in nine-tenths ignorance and indifference, about the same delegation of power occurs. The remaining fraction who do give enough time to the subject to cast an intelligent ballot, take control.

That fraction we call "politicians" in our unique American sense of the word. A "politician" is a political specialist. He is one who knows more about the voter's political business than the voter does. He knows that the coroner's term will expire in November, and contributes toward the discussion involved in nominating a successor, whereas the voter hardly knows a coroner is being elected.

The politicians come from all classes and ranks and the higher intelligence of the community contributes its full quota. Although they are only a fraction of the electorate they are a fair average selection and they would give us exactly the kind of government we all want if only they could remain free and independent personal units. But the impulse to organize is irresistible. Convenience and efficiency require it and the "organization" springs up and cements them together. Good men who see the organization go wrong on a nomination continue to stay in and to lend their strength, not bolting until moral conditions become intolerable. Were these men not bound by an organization with its social and other non-political ties, their revolt would be early, easy and effective and every bad nomination would receive its separate and proportionate punishment in the alienation of supporters.

#### *Politicians Can't Exclude Grafters From Their Ranks*

The control of an active political organization will gravitate always toward a low level. The doors must be open to every voter—examination of his civic spirit is impossible—and greed and altruism enter together. Greed has most to gain in a factional dispute and is least scrupulous in choice of methods. The bad politician carries more weapons than the politician who hampers himself with a code of ethics one degree higher. Consequently corruption finally dominates any machine that is worth dominating and sinks it lower and lower as worse men displace better, until the limit of public toleration is reached and the machine receives a set-back at election. That causes its members to clean up, discredit the men who went too far, and restore a standard high enough to win—which standard immediately begins to sag again by the operation of the same natural principle.

Reformers in our cities have given up the endeavor to maintain pure political organizations and elect reform administrations. A typical experience is that of the Citizens' Union of New York, whose leaders have always been sincerely bent on improving the condition of politics. The Union acquired power enough to become an important factor in elections. After the first such election, small political organizations which had aided toward the victory rushed in, clamoring for their share of the plunder. For a term or two the reformers were able to resist the pressure. Nevertheless the possession of power by their party inev-

itably attracted the grafters; they found themselves accepting assistance from men who were in politics for what there was in it, men who wanted to use the power and patronage that lay at hand unutilized, and it was clear that those men would in time, working within the Union, depose the original heads of the party and substitute "more practical" leaders of their own kind, until in time the Citizens' Union would itself need reforming. So the Union retired from the field as a party, broke up the district organizations which had yielded to corruption and became exclusive in its government in order to preserve its purity of purpose.

It is obvious that most political parties do not commit suicide to evade such internal contamination and lapse of principle.

Theoretically there is always the threat of the minority party which stands ready to take advantage of every lapse, but as there is no debate between minor candidates, no adequate public scrutiny or comparison of personalities, the minority party gets no credit for a superior nomination and often finds that it can more hopefully afford to cater to its own lowest elements. In fact, it may be only the dominant party which can venture to affront the lowest elements of its membership and nominate the better candidate.

#### *Misgovernment the Normal Result of Government by Politicians*

The essence of our complaint against our government is that it represents these easily contaminated political organizations instead of the citizens. Naturally! When practically none but the politicians in his district are aware of his actions or even of his existence, the office-holder who refuses to bow to their will is committing political suicide.

Sometimes the interests of the politician and the people are parallel, but sometimes they are not and the office-holder is apt to diverge along the path of politics. An appointment is made, partly at least, to strengthen the party since the appointee has a certain following. A bill is considered not on its simple merits but on the issue—"Who is behind it?" "If it is Boss Smith of Green County that wants it, whatever his reasons, we must placate him or risk disaffection in that district." So appointments and measures lose their original and proper significance and become mere pawns in the chess game of politics which aims to keep "our side" on top. The office-holders themselves may be upright, bribe-proof men—they usually are, in fact. But their failure to disregard all exigencies of party politics constitutes misrepresentative government and Boss Smith of Green County can privately sell his influence if he chooses, whereby the public is in the end a heavy sufferer.

#### *Summary of the Analysis*

Thus the connection between the long ballot and misgovernment is established: By voting the long ballot blindly, we entrust large governing power to easily-contaminated organizations of political specialists, and we must expect to get the kind of government that will naturally proceed from their trusteeship.

Every factor in this sequence is a unique American phenomenon. The long ballot with its variegated list of trivial offices is to be seen nowhere but in the United States. The English ballot never covers more than three offices, usually only one. In Canada the ballot is less commonly limited to a single office, but the number is never large. To any Englishman or Canadian our long ballot is astonishing and our blind voting appalling. A Swiss would have to live four hundred years to vote upon as many men as an American undertakes to elect in one day. The politicians as a professional class, separate from popular leaders or office-holders, are unknown in other lands and the very word "politician" has a special meaning in this country which foreigners do not attach to it. And government from behind the scenes by politicians, in endless opposition to government by public opinion, is the final unique American phenomenon in the long ballot's train of consequences.

## II

*The Voting That Is Not Blind*

The blind vote of course does not take in the whole ballot. Certain conspicuous offices engage our attention and we all vote on those with discrimination and care. We go to hear the speeches of the candidates for conspicuous offices, those speeches are printed in the daily papers, and reviewed in the weeklies, the candidates are the theme of editorials and the intelligent voter who takes no part in politics, votes with knowledge on certain important issues.

In an obscure contest on the blind end of the ballot merit has little political value, but in these conspicuous contests where we actually compare man and man, superior merit is a definite asset to a nominee. Hence in the case of an obscure nomination the tendency is automatically downward, but in a conspicuous nomination the tendency is upward.

Accordingly while we elect Aldermen who do not represent us and the State Legislatures which obey the influences of unseen powers, we are apt to do very well when it comes to the choice of a conspicuous officer like a President, a Governor, or a Mayor. For Mayor, Governor or President we are sure to secure a presentable figure, always honest and frequently an able and independent champion of the people against the very interests that nominated him. We are apt to re-elect such men, and the way we sweep aside hostile politicians where the issue is clear shows how powerfully the tide of our American spirit sets toward good government when the intelligence of the community finds a channel.

And so in these conspicuous offices—those for which we do *not* vote blindly—we secure fairly good government as a normal condition, considering that the organized and skillful opposition which always faces us occupies a position of great strategic advantage in possession of the nominating machinery.

## III

## THE REMEDY

We cannot hope to teach or force the entire citizenship to scrutinize the long ballot and cease to vote blindly on most of it. The Mountain will come not to Mahomet; Mahomet then must go to the Mountain.

*First.*—We must *shorten the ballot* to a point where the average man will vote intelligently without giving to politics more attention than he does at present. That means making it very short, for if the number of these simultaneous elections is greater than the bulk of the citizens care to keep track of, then we have government by the remaining 40 per cent., or 20 per cent. of the citizens—and no matter whom we believe to be at fault, that plan in practice will have resulted in oligarchy and be a failure. The test for shortness is to inquire when a given number of offices are filled by election whether the people vote blindly or not on any one of them. For if they begin to require "tickets" ready-made for their convenience they are sharing their power with the ticketmakers—and democracy is fled!

*Second.*—We must limit the elective list to offices that are naturally conspicuous. The little offices must either go off the ballot and be appointed, no matter how awkwardly, or they must be increased in real public importance by added powers until they rise into such eminence as to be visible to all the people. The County Surveyor, for instance, must go, for the electorate will not bother with such trifles whether the ballot be short or not.

Why indeed should 50,000 voters all be asked to pause for even a few minutes apiece to study the relative qualifications of Smith and Jones for the petty \$1,000-a-year post of County Surveyor? Any intelligent citizen may properly have bigger business on his hands!

And the Alderman?—we can't abolish him perhaps, but we can increase his power by enlarging his district and lengthening his term and making his Bos

a small one. Till then how can we make people in Philadelphia agitate themselves over the choice of a Common Councilor who is only one-one hundred and forty-ninth of one-half of the city legislature!

That candidates should be conspicuous is vital. The people must be able to see what they are doing; they must know the candidates—otherwise they are not in control of the situation, but are only going through the motions of controlling.

It may be objected that to take the minor offices off the state ticket for instance and make them appointive by the Governor would be giving too much power to the Governor. Well, somebody, we rarely know who, practically appoints them now.

To have them appointed by a recognized legally-constituted authority is surely better than to have them selected by a self-established coterie of politicians in a convention committee room. There is no great peril in concentrating power, provided we watch what is done with it. (Suppose we were electing by popular vote not only the President and Vice-President of the United States, but the cabinet, the Supreme Court and the other Federal Judges, the Federal marshals, district-attorneys and postmasters! Can you see how our American political superstitions would block all efforts to secure the present conspicuous responsibility?)

How an overdose of electing creates oligarchy is illustrated in Tammany Hall, which would appear to be in its form of internal government the most perfect democracy conceivable. But the primary ballot contains from 300 to 1,000 names and bossism is thereby entrenched absolutely.

#### *The Short Ballot in Operation*

Fighting misgovernment now is like fighting the wind. We must get on a basis where the good intentions of the average voter find intelligent expression on the entire ballot so as to produce good government as a normal condition, i. e., good government which regularly gets re-elected as a matter of course by overwhelming majorities without a great fight. Impossible in this country? No! Galveston has it with its government by a Commission of Five. This Commission has without scandal carried through tremendous public improvements (raising the ground level to prevent another flood), and at the same time has reduced the public debt and the tax rate. That is good administration. More than that, it gets re-elected by overwhelming majorities and has not been in peril at any election. The "Old Crowd" that misgoverned this city for years holds only 20 per cent. of the vote now, and concedes without contest the re-election of three of the five good commissioners. And the total campaign expenses of electing the right men are only \$350.

It has been thought that this was the fruit of correct organization, analogous to a business corporation with its board of directors. But there are many other elected commissions and boards in the United States—"County Commissions," "Boards of Education," "Trustees of the Sanitary District," "Boards of Assessors," etc.—and they are not conspicuously successful, but in fact such organization often serves only to scatter responsibility and shelter corruption. No! Good government is entirely a matter of getting the right men in the first place. Nothing else is so vital. No system, however ingenious, will make bad men give good government or keep good men from getting superior results. To get the right men is first of all a matter of arranging for the maximum amount of concentrated public scrutiny at the election.

Were it otherwise, we would find misgovernment in British cities which, except for this feature are ideally organized from an American grafter's point of view. The British city authorities are hampered most unjustly by a hostile House of Lords, their machinery of government is ancient and complicated, and their big councils with committees exercising executive management over the departments, with ample opportunity for concealment of wrongdoing, with no restraining civil service examinations, with one-tenth of the laboring population on the municipal pay rolls would apparently provide an impregnable paradise

for the American politician of the lowest type. But the ballot for an English municipal election can be covered by the palm of the hand. It contains usually the names of two candidates for one office, member of the Council for the ward. (The Council elects the Mayor, the Aldermen and all other city officers.) Blind voting on so short a ballot is hardly conceivable. Every voter is a complete politician in our sense of the word. The entire intelligence of the community is in harness, pulling, of course, toward good government. An American ward politician in this barren environment, unaided by any vast blind vote, could only win by corrupting a plurality of the whole electorate, a thing that is easily suppressed by law even if it were not otherwise a manifest impossibility. So there are no ward politicians in England, no professional politics, and misgovernment is abnormal.

## BALLOT PAPER

1.	<p><b>NETTLEFOLD.</b> (John Sutton Nettlefold, Winterbourne, Edgbaston Park Road, Edgbaston, Gentleman.)</p>	
2.	<p><b>TUNBRIDGE.</b> (William Stephen Tunbridge, Rocklands, Woodbourne Road, Edgbaston, Solicitor.)</p>	

This is a typical official ballot (actual size) for an English election. It shows the names of two candidates for a single office—Councilor from the ward. The people simply make one choice, and accordingly know just what they are doing on election day. The scrutiny of the people thus concentrated bars out unfit candidates almost automatically.

Similarly Galveston concentrated the attention of the voters sharply upon candidates for only five offices, all very important. The press could give adequate attention to every one and in consequence every intelligent voter in his easy chair at home formed opinions on the whole five and had a definite notion of the personality of every candidate. In such a situation the ward politician had no function. There was no ignorant *laissez-faire*, no mesh of detail for him to trade upon. He became no more powerful than any other citizen, and his only strength lay in whatever genuine leadership he possessed. Moreover, if he nominated men who could stand the fierce limelight and get elected, they would, *ipso facto*, probably be men who would resist his attempt to control them afterward. Or if they did cater to him it would be difficult to do his bidding right in the concentrated glare of publicity where the responsibility could be and, what is much more vital, *would* be, correctly placed by every voter. And so the profession of politics went out of existence in Galveston and the ward politician who had misgoverned the city for generations went snarling into oblivion.

The Galveston plan might be better yet if the Commissioners were elected one at a time for long terms in rotation. Then the public scrutiny at election time would focus still more searchingly on the candidates and merit would increase still further in value as a political asset.

"Politics," seeking re-entrance into Galveston, would make department heads, etc., elective ("make them directly responsible to the people and let the pee-pul rule").

Suppose that they should increase the Commission to thirty members elected "at large" with variegated powers and functions. Straightway tickets, cooked

up by "leaders," would reappear, and the voter, facing a huge list of names, most of which he had hardly heard of would impotently "take program" and concede control to a little but active minority, the politicians.

But suppose again that the enlarged commission be elected not "at large," but by wards, one member to a ward. The voter again has only one decision to make, instead of thirty. Newspaper publicity is weakened by division, but this weakness is now repaired by neighborhood acquaintance and the candidate's opportunity to make himself personally known to a large portion of his constituency. Once more, the voter registers an opinion instead of blindly ratifying the work of a party organization. The ward politician is again left without a function. His popularity may avail in certain wards, and he may thus elect some of the commission, but he will not have from any citizen who is intelligent enough to do his own thinking that blind acquiescence which in other conditions had been the bedrock of his power.

#### *Conclusion*

Just how we are to get rid of the great undigested part of our long ballot is a small matter so long as we get rid of it somehow. Govern a city by a big Board of Aldermen, if you like, or by a Commission as small as you dare make it. Re-adjust State constitutions in any way you please. Terms of tenure in office can be lengthened. Many officers, now elected, can be appointed by those we do elect. But manage somehow to get our eggs into a few baskets—the baskets that we watch.

For remember—we are not governed by public opinion, but by public-opinion-as-expressed-through-the-pencil-point-of-the-Average-Voter-in-his-election-booth. And that may be a vastly different thing! Public opinion can only work in broad masses, clumsily but with tremendous force. To make a multitude of delicate decisions is beyond its blunt powers. It can't play the tune it has in mind upon our complicated political instrument. But give it a keyboard simple enough for its huge, slow hands, and it will thump out the right notes with precision!

There is nothing the matter with Americans. We are by far the most intelligent electorate in the world. We are not apathetic. Apathy is a purely relative matter depending on how much is asked. Ask much of the people and you will see more apathy than if you ask little. If the people of Glasgow were asked to attend caucuses, primaries, conventions and rallies in support of the best candidates for Coroner, they too would stay home by their firesides and let the worst man have it. If they had our long ballot they would be in a worse mess than we are with it. And if we, on the other hand, could get their handy short ballot, we too would use it creditably. For our human nature is no worse than theirs. The Scotch immigrant in our midst is no more active a citizen than the rest of us. We are not indifferent. We do want good government. And we can win back our final freedom on a short ballot basis!

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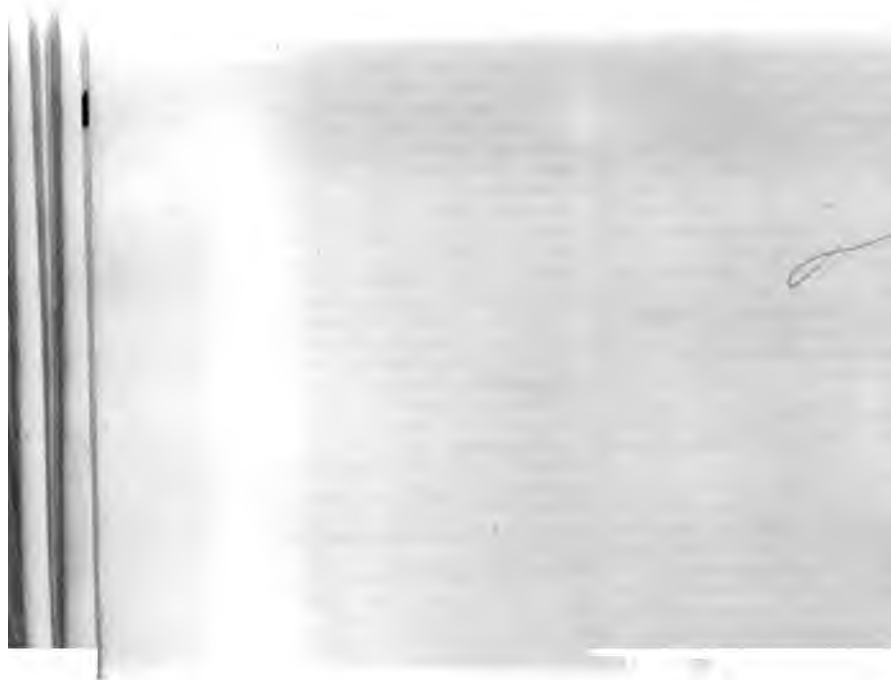
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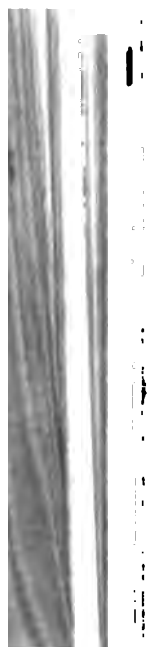












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